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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. [redacted] 103

GULF/MEDITERRANEAN PORTS CONFERENCE, ET AL.,

Petitioners,

versus

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, H. KEMPNER, GALVESTON COTTON COMPANY, TEXAS COTTON INDUSTRIES, AND THE MEMBERS OF THE FAR EAST CONFERENCE,

Respondents.

PETITION OF GULF/MEDITERRANEAN PORTS CONFERENCE, ET AL., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PETITION OF GULF/MEDITERRANEAN PORTS CONFERENCE, ET AL., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

I.

REPORTS OF OPINIONS BELOW

Federal Maritime Commission: H. Kempner v. Lykes Bros. Steamship Co., Inc., et als. Docket No. 732 (with which were consolidated for hearing Docket Nos. 726, 733, 734, and 735). 1 S.R.R. 517, reported at 1962

A.M.C. 743, *sub nom* Isbrandtsen Co., Inc. v. States Marine Co. of Del.

The United States Court of Appeals for the District of Columbia Circuit: H. Kempner, Galveston Cotton Industries, Petitioners v. Federal Maritime Commission (Formerly Federal Maritime Board) and United States of America, Respondents; Gulf/Mediterranean Ports Conference, et al., the common carriers by water, members of the Far East Conference, Intervenors, No. 16,658. This decision has not yet been officially reported.

Copies of the opinions are included herein as Appendix A and Appendix B respectively.

II.

GROUND OF JURISDICTION

The decree sought to be reviewed is that entered on January 10, 1963 by the United States Court of Appeals for the District of Columbia Circuit, reversing a report and decision of the Federal Maritime Commission.[1] Timely motion for rehearing was denied by the Court of Appeals in an order entered February 15, 1963.

Jurisdiction of this Court to review the decree in question is conferred by the United States Code, Title 28, Section 1254(1).

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[1] At the time of the decision below the agency created by the Shipping Act, 1916, was designated as the Federal Maritime Commission. Previously it had functioned under different names. For the sake of consistency it is generally referred to herein as the Federal Maritime Commission or the Commission regardless of the period of time referred to.

III.

QUESTIONS PRESENTED

The Gulf/Mediterranean Ports Conference and its members,[2] common carriers by water in foreign commerce, commencing July 1, 1949 and continuing to the present time, have employed the dual rate contract—non-contract system on cotton from Gulf ports to ports in the Mediterranean area. The firm of H. Kempner, not being a signatory to the contract, paid the higher non-contract rate on its shipments and filed a complaint with the Federal Maritime Commission seeking to have this dual rate system declared illegal and to recover reparations.

The Federal Maritime Commission found that this dual rate system was legal in all respects, that it was not violative of the provisions of the Shipping Act, 1916, including a specific finding that it had approved the institution of the dual rate system: The Commission also held alternatively that if the system had been otherwise illegal its legality was established and confirmed by the so-called "Moratorium" Act[3] which had effect not only prospectively but from the original adoption of the dual rate system. The Commission dismissed the complaint and denied reparations.

The Court of Appeals, in its *per curiam* decision, one

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[2] Lykes Bros. Steamship Co., Inc., States Marine Corporation & States Marine Corporation of Delaware, Compania Maritima del Nervion, Societa Anonima Navigazione Alta Italia, Ltd., Waterman Steamship Corporation, Alexandria Navigation Company, S.A.E., Bloomfield Steamship Company, Blue Funnel Line - Java New York Line, Compagnie de Navigation Cyprien Fabre, Compagnie Generale Trans-Atlantique, Concordia Line, Ellerman & Bucknall Associated Lines, Fern-Ville Mediterranean Lines - Fearnley & Eger & A. F. Klaveness & Company, Hellenic Lines, Ltd., Leif Hoegh & Company A/S, Isthmian Steamship Company, Prudential Steamship Corporation and Israeli Judges Line Shipping & Navigation Company, Ltd.

[3] The Moratorium Act, Pub. L. 85-626, 85th Congress, 72 Stat. 574, was enacted August 12, 1958. It amended Section 14 of the Shipping Act, 1916, 39 Stat. 733, 46 USC § 812. See Appendix C, page 67.

judge dissenting, held that the Federal Maritime Commission had not approved the use of this dual rate system when instituted, that the Moratorium Act was prospective only and did not operate to deny reparations covering shipments made prior to its enactment. Although the brief *per curiam* majority opinion, as well as the dissenting opinion, are set out in Appendix B, the majority opinion is given here in full to better illustrate the points at issue:

> "PER CURIAM: The Federal Maritime Board denied reparations sought by the petitioners because of the imposition of dual rates said to have been unlawful. It held that, since it had not disapproved the rates, it had in effect approved them; and that, in any event, the so-called Moratorium Act protected the carriers from liability which accrued before its passage.
>
> "The discriminatory rates here involved were not approved by the regulatory agency merely because it was silent concerning them, and the rates were therefore illegal. We think, too, that the Moratorium Act is prospective only and so does not relieve an offender from liability for reparations arising from a violation which occurred prior to its enactment.
>
> Reversed and remanded to the Commission for assessment of reparations."

Accordingly, the questions presented are: 1) whether the Federal Maritime Commission had given such approval as may have been required to the use of this dual rate contract system, and 2) whether the Moratorium Act established and confirmed the legality of the dual rate contract system from its inception, as well as prospectively, and restricted the authority of the Courts, as well as of the Federal Maritime Commission, to hold the system illegal.

IV.

STATUTES INVOLVED

The statutes involved are Sections 14 and 15 of the Shipping Act, 1916, (46 U.S.C.A. 812, 814), the former section having been amended by the Moratorium Act of August 12, 1958 (Publ. L. 85-626, 85th Congress, 72 Stat. 574). These sections of the Act and the Amendment are included in Appendix C.

V.

STATEMENT OF THE CASE

Gulf/Mediterranean Ports Conference is a conference of common carriers in the trade between Gulf ports and ports in the Mediterranean area operating under an agreement approved by the Commission's predecessor on January 23, 1930 and providing for the joint making of rates, rules and regulations.

In compliance with a request from the American Cotton Shippers Association whose membership included all exporters of cotton, on July 1, 1949 the Conference instituted a dual rate contract—non-contract system on cotton from Gulf ports to ports in the Mediterranean area. The dual rate system is one under which the Conference establishes tariffs of rates at two levels, the lower of which is charged merchants who agree to ship by Conference lines only and the higher of which is charged merchants who do not so agree.

H. Kempner, although originally a signatory to the contract, terminated its contract with the Conference and thereafter, beginning in 1951, commenced shipping largely by non-conference lines but paying the non-contract rate on such shipments as it made by conference carriers. It filed a complaint with the Federal Maritime Commission

seeking to have the contract system on cotton declared illegal and sought reparations. After lengthy hearings before an Examiner, in which every facet of the contract system was reviewed thoroughly, the Commission held the contract system to be legal and denied reparations. The record on which this decision was made covered in full detail the request of the cotton shippers themselves for the use of the system, the reasons prompting both the shippers and the conference to adopt the system, the amount and justification for the spread between contract and non-contract rates, the general terms and provisions of the contract, the filing by the Conference with the Commission of the contract form and tariff of rate differentials, together with complete details of all preliminary negotiations with the cotton shippers toward adoption of the contract. The contract was a joint product of the Conference and the shippers concerned.

At the time the Commission decided the case it carefully weighed and considered the facts in the light especially of two important cases relating to dual rate contract systems, *Isbrandtsen Co., Inc. v. U. S.*, 211 F. 2d 51 (D.C. Cir., 1954), cert. den. 347 U.S. 990 (1954), holding that a dual rate system required the Commission's approval in addition to the approval given the basic conference rate making agreement, and *Federal Maritime Board v. Isbrandtsen Co., Inc.*, 356 U.S. 481, 78 S. Ct. 851 (1958), holding illegal, as violative of the provisions of Section 14, third, of the Shipping Act, 1916, as amended, a dual rate system having a coercive effect on shippers and whose design and effect was to stifle outside competition.

On the question of its approval of this dual rate system the Commission held that it had approved the system in accordance with its practices and procedures

then in effect; and on the question of its possible coercive effect on shippers and stifling of outside competition the Commission held that it had no such purpose or effect. It will have been noted from the majority opinion of the Court of Appeals that the Court in no way questioned the correctness of the latter finding and conclusion of the Commission; the Court's sole point of disagreement with the Commission—aside from the effect of the Moratorium Act—related to the matter of approval or non-approval by the Commission.

As to the Moratorium Act amendment to Section 14 of the Shipping Act, 1916 (August 12, 1958), the Commission did not limit its effect to the period following its enactment but applied it to all dual rate systems which qualified under the terms of the Act. This dual rate system admittedly qualified under the Act. The Commission held that the Act "restricts our authority to construe or apply the Act to make unlawful any dual rate contract arrangement" covered by the Act. On this point the majority of the Court of Appeals disagreed, holding that the Moratorium Act is "prospective only" from the date of its enactment, to which there was a full and vigorous dissenting opinion which concluded that "on the record the Board could have done nothing but what it did do."

VI.

ARGUMENT

A.

The questions presented, it is submitted, require review by this Court.

Dual rate contract systems, similar in all material respects to the one here involved, had been in general

use by conferences for decades and covered the bulk of all general cargo exports carried by common carrier lines. It is a matter of common knowledge that with perhaps one or two exceptions these systems, some sixty or more in number, had received approvals by the Maritime Commission in accordance with its practices and procedures in such cases. Admittedly this did not include the issuance to the conference of a formal certificate or document. No such formal documents have ever been issued by the Commission or its predecessors in respect of any agreement or arrangement which required the Commission's approval under Section 15 of the Shipping Act, even including the basic conference rate-making agreements themselves. Accordingly, if the past practices and procedures of the Commission in respect of dual rate contract systems has been insufficient to confer an approval such as is required by law, then the legality of practically all dual rate systems, at least up to the time of the Moratorium Act, will have been highly questionable. The exact form and procedures required to confer approval under Section 15 of the Shipping Act have not, so far as we know, ever been decided by any court.[4]

If the many dual rate contract systems which had been in use were illegal because not approved with a sufficient degree of formality then a determinative construction of the purpose and effect of the Moratorium Act is necessary. Was this Act "prospective only" as held by the majority below, or did it protect all dual rate systems qualifying under its provisions regardless of time, as found by the minority? Since, as mentioned previously,

[4] *Isbrandtsen Co., Inc. v. U. S.*, 211 F. 2d 51 (D.C. Cir., 1954), cert. den. 347 U.S. 990 (1954), merely held that an "approval" was necessary and that there had been none. But in this case, under new and different procedures adopted by the Commission, objections had been filed with the Commission to the institution of the system which were the subject of a Commission hearing then in progress. Under the circumstances it was admitted that no kind of approval had been given.

substantially all dual rate systems had received the same type of approval as the one here involved, it is important to all of the conferences concerned to have determined the scope and effect of this Act. Except for the decisions of the Commission and the Court of Appeals in this case there appears to have been no case construing the Act specifically as regards the period during which legality was conferred by the Act.[5]

Thus we submit that the questions presented are important questions of federal law not heretofore decided and that they should be decided by this Court.

B.

The Gulf Mediterranean Ports Conference did all that conceivably could be required of it to obtain Commission approval of its dual rate contract system on cotton. It not only filed with the Commission the contract form and the differentials between contract and non-contract rates but, commencing some two months prior to the institution of the system on July 1, 1949, it filed with the Commission the Conference minutes giving full accounts of the several meetings and discussions with the cotton shippers leading up to the adoption of the contract, covering the detailed provisions of the contract, the several amended forms and the final form of the contract, discussions and conclusions as to the shipments which

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[5] Cases which have applied the Moratorium Act or construed it in other respects are:

Swift & Co. v. Federal Maritime Commission, 306 F. 2d 277 (D.C Cir., 1962); *Empire State Highway Transp. Ass'n v. Federal Maritime Board*, 291 F. 2d 336 (D.C. Cir., 1961), cert. den. 368 U.S. 931; *Benson v. U. S.*, 263 F. 2d 899 (D.C. Cir., 1959); *Anglo Canadian Shipping Co. v. U. S.*, 264 F. 2d 405 (9 Cir., 1959); *Gulf and South Atlantic Steamship Agreement*, 1961 A.M.C. 1001 (F.M.B. Docket Nos. 849, 851 and 854); *Pasch v. Chemoleum Corp.*, 209 N.Y.S. 2d 191 (S. Ct., N. Y. County, 1960); *Pasch v. Chemoleum Corp.*, 210 N.Y.S. 2d 738 (S. Ct., N. Y. County, 1960), affirmed 214 N.Y.S. 2d 644 (N.Y. Sup. Ct., Appellate Div.).

were to be included under the contract, the contract—non-contract rate differentials and the reasons why both the Conference and the shippers desired the dual rate system. These filings were made on May 3, 10, 17, 31 and June 1, 13, 16, 21 and 22. They are set out in full in the Joint Appendix at pages 222 to 285, comprising some 65 pages of material. The cotton contract was put into effect on July 1, 1949.

In respect of these filings the Commission in its Report found and held:

> "The procedure by which agreements between carriers are declared legal or illegal under the Act is that they be 1. filed with the Board pursuant to Sec. 15; 2. reviewed; and 3. passed on for legality." Report of Commission p. 13; herein Appendix A, p. 34.
>
> "The facts showing that Mediterranean filed and obtained Board approval of a conference contract and filed transcripts of minutes of its meetings showing agreement among its members for the adoption of the practice of offering dual rates and exclusive patronage contracts and filed tariffs containing dual rate provisions establishes that Mediterranean has filed an agreement pursuant to Sec. 15. * * * These transcripts have been reviewed by the Board's staff and no exception taken thereto. Board approval of both agreements is required; *Isbrandtsen Co., Inc. vs. U. S.*, 211 F. 2d 51 (1954), cert. den. 347 U.S. 990 (1954), and approval has been given. The Board's approval was neither subsequent nor retroactive, but existed at the time it accepted tariff changes showing dual rates and did not disapprove the results of the conference meetings and the tariff revisions by order. *Empire State Highway Transport Assn. v. F. M. B., U. S. A. and American Export Lines, Inc.*, U.S.C.A., D.C. Cir. April 27, 1961.

> "The Board has followed for many years the administrative practice of initiating proceedings and of issuing orders where agreements were to be disapproved under Sec. 15 and where organic agreements and modifications thereof are approved. *Section 15 Inquiry* 1 U.S.S.B. 121 (1927).
>
> "Sec. 15 authorizes the Board to disapprove by order, but not approve by order. All other agreements may simply be approved. Approval has been tacit where no action was taken and no order was issued, and this has always been considered as appropriate and consistent with Sec. 15. *Section 15 Inquiry (supra)*. Other forms of approval by the issue of written statements have been heretofore not been considered a necessary technique of administering the Act. Limitations of staff compelled the use of the technique which was followed. Since the decision in *Isbrandtsen Co., Inc. v. U. S. (supra)* and *River Plate & Brazil Conferences v. Pressed Steel Car Co., Inc.*, 227 F. 2d 60 (2d Cir. 1950), however, new approval procedures have been instituted." Report of the Commission, pp. 14, 15; herein Appendix A, pp. 36-37.

It would seem clear that the Commission in fact approved; what was lacking, if anything, was a formal document or certificate evidencing its approval. As previously noted no such formal document or certificate is ever issued by the Commission. This is quite understandable in view of the provisions of Section 15 of the Shipping Act. Section 15 does not specify any form of procedure on the part of either the parties or the Commission for securing approval of agreements. It provides, insofar as is here material, as follows:

> "The Board may **by order disapprove**, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discrimi-

> natory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and **shall approve** all other agreements, modifications, or cancellations." (Emphasis supplied)

It is clear that although the Congress was specific in directing the manner in which agreements might be **disapproved** (it must be **by order**), it does not specify at all the manner in which such an agreement should be **approved.**

It is submitted that the substance rather than the form of the approval should govern, especially under a statute which leaves all procedural formalities for the giving of approval entirely to the discretion of the administrative agency exercising this function.

C.

Promptly following this Court's decision in *Federal Maritime Board v. Isbrandtsen Co., Inc.*, 356 U.S. 481, 78 S. Ct. 851 (1958), the Congress, on August 12, 1958, enacted Pub. L. 85-626, 85th Congress, 72 Stat. 574 (for full text see Appendix C) amending the Shipping Act, Section 14, by providing that "nothing in this section or elsewhere in this Act, shall be construed or applied to forbid or make unlawful any dual rate contract agreement in use by the members of a conference on May 19, 1958," reserving to the regulatory agency the power to disapprove, cancel or modify the arrangement in accordance with the standards of Section 15 of the Act. This statute covered the Gulf-Mediterranean contract arrangement on cotton. By successive extensions the statute remained in effect until the enactment on October 3, 1961

of Pub. L. 87-346, 75 Stat. 762, which not only gave validity to contract rate systems previously in use but also to their continued use in the future provided they were amended within six months if necessary to conform to certain specific requirements.

Pub. L. 85-626 was not merely a change in a statute establishing a new concept, right or regulation for future observance. It construed the meaning, intent and effect of language which the Congress had itself used previously in the original statute. It referred to Section 14 of the Shipping Act previously enacted and provided that nothing in the language of that section or elsewhere in the Act "shall be construed or applied to forbid or make unlawful" any dual rate contract arrangement in use by the members of a conference on May 19, 1958.

Support for this conclusion is found in the Report of the Committee on Merchant Marine and Fisheries to accompany H.R. 6775, on June 8, 1961 (87th Cong., 1st Sess., House of Representatives Report No. 498) interpreting Sec. 14, Third of the Act as amended by Pub. L. 85-626 in 1958, as follows:

> "In view of the grave doubts cast by the Supreme Court decision upon the legality of the dual rate system and the possible detrimental results to both American shipping and American foreign commerce, legislation was enacted in the 2d Session of the 85th Congress to authorize the **continuation in force** of any existing dual rate contract arrangement until June 30, 1969." (Emphasis supplied)

In its report dated August 31, 1961 accompanying H.R. 6775 which was enacted by Congress as Pub. L. 87-346, 75 Stat. 762, the Senate Committee on Commerce

referred to the previous acts legalizing dual rate systems in the following language:

> "Congress promptly decided that until it could carefully study conferences and their need to use such contracts, it must insulate them from the effects of that decision. There was little alternative; sudden disruption of international shipping's primary way of doing business to and from the United States being the only real choice."

Under this amendment the Commission still retained jurisdiction to disapprove, cancel or modify a dual rate arrangement if it found it to be not in accordance with the standards set forth in Section 15 of the Act. Thus, an arrangement which the Commission finds to be discriminatory or unfair or to operate to the detriment of the commerce of the United States may be disapproved, cancelled or modified. The Commission clearly had no jurisdiction to do so on any other ground. The function of the Court below was to determine whether the Commission correctly decided the question of legality or illegality. Under this amendment, the Commission, in holding the arrangement legal, could not have decided otherwise. (*Steiner v. Mitchell*, 350 U.S. 247, at p. 253, ff., 76 S. Ct. 330, 100 L. Ed. 267, at p. 272, ff. (1956); *Battaglia v. General Motors Corp.*, 169 F. 2d 254 (2 Cir., 1948), cert. den. 335 U.S. 887. In the latter case, the Court said:

> "This seems plain enough, if we take the view that the claims rested purely on statute up to the time the Portal-to-Portal Act was enacted. Clearly, the general rule is that 'powers derived wholly from a statute are extinguished by its repeal.' *Flanigan v. County of Sierra*, 196 U.S. 553, 560, 25 S. Ct. 314, 315, 49 L. Ed. 597. The Supreme Court, moreover, has told us that rights granted to employees under the Fair Labor Standards Act, have

> a 'private-public character' and has indicated that they are 'charged or colored with the public interest.' See *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704, 709, 65 S. Ct. 895, 903, 89 L. Ed. 1296. Congress has also found that it 'is in the national public interest and for the general welfare, essential to national defense and necessary to aid, protect, and foster commerce' that the Portal-to-Portal Act be enacted. 29 U.S.C.A. § 251 (a). This being true, so long as the claims, if they were purely statutory, had not ripened into final judgment, regardless of whether the activities on which they were based had been performed, they were subject to whatever action Congress might take with respect to them."

The dissenting opinion below (Appendix B, p. 59) reviewed the legislative history of the Act, which makes it clear that during the currency of the statute its application by judicial tribunals, as respects dual rate systems which it covered, was not limited as to time. The dissenting opinion concluded, and we submit correctly:

> "So read the law when the Board decided this case on August 4, 1961. Congress had amended the very Act from which the Board derived whatever authority it may have. Congress had spoken in behalf of a public policy of nearly a half century. As I read it, both the language of the statute and the congressional purpose are clear. It seems to me that on this record the Board could have done nothing but what it did do."

We submit that the Act was not "prospective only" but that it covered at all times the dual rate systems which fell within the purview of the statute.

Accordingly, Petitioners request that a writ of certiorari issue herein to the United States Court of Appeals for the District of Columbia Circuit, that the decree herein be reversed and that the order of the Federal Maritime Commission be reinstated.

Respectfully submitted,

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Attorneys for Petitioners.

TERRIBERRY, RAULT, CARROLL,
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Of Counsel.

April 5, 1963.

APPENDIX "A"
Report of the Federal Maritime Commission

(S E R V E D)
(AUGUST 9, 1961)
(FEDERAL MARITIME BOARD)

FEDERAL MARITIME BOARD

No. 726
ISBRANDTSEN CO., INC.
v.
STATES MARINE CORPORATION OF DELAWARE, ET AL.

No. 732
H. KEMPNER
v.
LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 733
H. KEMPNER
v.
LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 734
GALVESTON COTTON COMPANY
v.
LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 735
TEXAS COTTON INDUSTRIES
v.
LYKES BROS. STEAMSHIP CO., INC., ET AL.

Submitted May 3, 1961 Decided August 4, 1961

Exclusive Patronage Contracts and Dual Rate Systems used by the Far East Conference and by the Gulf-Mediterranean Ports Conference found to be pursuant to agreements filed with the Federal Maritime Board and approved by the Board. The agreements filed by Far East Conference and Gulf-Mediterranean Ports Conference found not to be unjustly discriminatory or unfair as between shippers or carriers, or to operate to the detriment of the commerce of the United States, or to be in violation of Sec. 15 of the Shipping Act, 1916, as amended.

States Marine Corporation of Delaware, a common carrier by water, found to have demanded, charged and collected a rate which is unjustly discriminatory between shippers in violation of Sec. 17 of the Shipping Act, 1916, as amended.

Waterman SS Corp., a common carrier by water, found to have demanded, charged and collected a rate which is unjustly discriminatory between shippers in violation of Sec. 17 of the Shipping Act, 1916, as amended.

Isbrandtsen Co., Inc., complainant, entitled under Sec. 22 of the Shipping Act, 1916, as amended, to reparation for the injury caused by the violation of said Act by States Marine Corporation of Delaware and Waterman SS Corp. in the amount of $6,687.28.

Isbrandtsen Co., Inc., found not to have proven violations of the Shipping Act, 1916, as amended, including Secs. 14, 15 and 16 thereof, by the Far East Conference or by any of its members.

Complainants, Harris L. Kempner, Trustee, Galveston Cotton Co. and Texas Cotton Industries, Inc., shippers, found not to have proven violations of the Shipping Act, 1916, as amended, including Secs. 14, 15, 16 and 17 by the Far East Conference or by the Gulf-Mediterranean Conference or by any of the members thereof.

Motion of respondents, other than Isthmian Steamship Company, to remand the record and the recommended

decision to the chief examiner with directions to rule on additional findings denied.

John J. O'Connor and *John J. O'Connor, Jr.* for Isbrandtsen Co., Inc.

Richard W. Kurrus for Isbrandtsen Co., Inc.

Delmar W. Holloman and *Shelby Fitze* for Harris L. Kempner, Trustee, Galveston Cotton Co. and Texas Cotton Industries, Inc.

Herman Goldman, Elkan Turk, Elkan Turk, Jr., Seymour H. Kligler and *Sol D. Bromberg* for Far East Conference and its members, other than Isthmian Steamship Co.

Walter Carroll for Gulf-Mediterranean Ports Conference and its members.

Frank Gormley, Robert B. Hood, Jr., Robert C. Bamford, Edward Aptaker and *Robert E. Mitchell*, Public Counsel.

REPORT OF THE BOARD

Thos. E. Stakem, Chairman; Ralph E. Wilson, Member

By the Board.

1. *Proceedings*

These proceedings involve five complaints of excessive freight charges for the shipment of cotton from Gulf of Mexico ports in 1951, 1952 and 1953.

In Docket No. 726 Isbrandtsen Co. Inc. (Isbrandtsen), as a shipper, complains that the Far East Conference (Far East) and its twenty member and five associate lines violated Secs. 14, 15, 16 and 17 of the Shipping Act,

1916 as amended (Act) by a refusal to carry cotton to Japan either pursuant to an exclusive patronage contract or subject to the lower freight charges applicable to shippers having such a contract. Isbrandtsen also complains that Far East's "system" of requiring an exclusive patronage contract as a prerequisite to lower freight rates had not been filed with the Board and in any event may not be approved by the Board if it is filed. Overcharges by specified carriers on bills of lading "to the prejudice of, and in discrimination against Complainant, and in violation of the Shipping Act, 1916, and other laws of the United States" are charged by Isbrandtsen in Docket No. 726.

In Docket No. 732 Harris L. Kempner, Trustee (Kempner) as a shipper, complains that specified common carriers by water, the Gulf-Mediterranean Ports Conference (Mediterranean) and its members violated the same sections of the Act by a refusal to carry cotton to Italy, Yugoslavia and Spain under similar conditions.

In Docket No. 733 Kempner, as a shipper, complains that specified common carriers by water, the Far East Conference and its members violated the same sections of the Act by a refusal to carry cotton to Japan, Indo China and the Philippines under similar conditions.

In Docket No. 734 the Galveston Cotton Co. (Galveston Cotton) as a shipper, complains that specified common carriers by water, the Far East Conference and its members violated the same sections of the Act by a refusal to carry cotton to Japan under similar conditions.

In Docket No. 735 Texas Cotton Industries Inc. (Texas Cotton) as a shipper, complains that specified common carriers by water, the Far East Conference and

its members violated the same sections of the Act by a refusal to carry cotton to Japan under similar circumstances.

The complaints in Docket Nos. 732, 733, 734 and 735 also alleged that actions complained of "will constitute violations of the Shipping Act and the Sherman Anti-Trust Act". Reparations damages and other relief are asked for by all of the complainants.

At a prehearing conference June 25, 1953, the five separate proceedings were consolidated for hearing on a single record. Docket Nos. 726, 733, 734 and 735 contain complaints against the Far East Conference and its members and Docket No. 732 contains a complaint against the Mediterranean Conference members. An examiner submitted a recommended decision on November 8, 1957. The recommended decision was followed by the submission of exceptions and replies thereto, followed by oral argument before the Board on February 10, 1959. No report was issued in view of pending litigation and Congressional legislation and subsequently two new members of the Board were appointed. The present Board decided to hear oral argument on the existing record prior to making its decision. We heard further oral argument on May 3, 1961.

II. *Facts*

Isbrandtsen's complaint is directed primarily at States Marine Corporation of Delaware (States Marine) and Waterman Steamship Corp. (Waterman), common carriers by water, and members of Far East, to recover $6,687.28 as reparations for excess freight charges in the amount of $4.00 a ton on 6320 bales or about 1,672 short tons of cotton carried to Japan. Far East, since February 1950, has followed the practice of charging shippers

who sign exclusive patronage contracts $4.00 per short ton less than its established tariff rates for shipments of cotton. Isbrandtsen was not a party to an exclusive patronage contract at the time of the shipments in question. Isbrandtsen became a shipper of cotton as the result of its inability to charter a ship to carry cotton which Kempner had booked with Isbrandtsen as a common carrier by water. Isbrandtsen sought to discharge its obligation to Kempner by having the cotton shipped by States Marine and Waterman. The shipments were transported to Japan pursuant to 51 bills of lading showing Isbrandtsen as the shipper and dated from August 3, 1952 to September 18, 1952. Reparations were claimed in the amount of $5,455. from States Marine and $1,232.28 from Waterman. Isbrandtsen paid the freight at non-contract rates:

Kempner's complaint in No. 732 is directed primarily at six common carriers by water, members of Mediterranean, to recover reparations indicated for overcharges on bills of lading as follows:

Lykes Bros. Steamship Co. (Lykes) (26 bills of lading dated from 3-15-51 to 10-27-52)	$6,861.19
Kerr Steamship Company (Kerr) (2 bills of lading dated 12-31-51)	1,836.86
States Marine (22 bills of lading dated from 3-27-51 to 12-15-52)	4,763.99
Societa Italiano de Armamento "SIDARMA" (Sidarma) (10 bills of lading all dated 6-7-51)	1,779,06
Compania Maritima del Nervion (Nervion) (1 bill of lading dated 8-26-52)	1,562.68

Sociata Anonima Navigazione Alta Italia (Creole Line) (17 bills of lading dated from 2-23-51 to 1-29-52)	2,436.78

The cotton was shipped to Italy, Yugoslavia and Spain. Mediterranean charges 25¢, 30¢ and 35¢ per 100 lbs. extra for cotton not shipped pursuant to an exclusive patronage contract.

Kempner's complaint in No. 733 covers a similar cause of action naming the following common carriers by water, and is for the purpose of recovering the reparations indicated for overcharges on bills of lading as follows:

Lykes (69 bills of lading dated 2-15-51 to 12-31-52)	$19,288.66
States Marine (77 bills of lading dated from 2-28-51 to 9-30-52)	12,737.67
Kokusai Lines et al (Kokusai) (12 bills of lading dated 11-13-51 to 9-30-52)	1,860.82
Mitsui Steamship Co. Ltd. (Mitsui) (13 bills of lading dated 11-30-51 to 8-25-52)	2,374.84
Kawasaki Kisen Kaisha, Ltd. (Kawasaki) (1 bill of lading dated 11-15-52)	103.97
Nippon Yusen Kaisha Ltd. (Nippon) (23 bills of lading dated 9-19-51 (to 11-28-52)	4,708.24
Fern-Ville Far East Lines et al (Fern-Ville) (10 bills of lading dated 5-31-52 to 9-9-52)	2,408.23

Galveston Cotton's complaint in No. 734 covers a similar cause of action naming the following common carriers by water and is for the purpose of recovering the reparations indicated for overcharges on bills of lading as follows:

Lykes (77 bills of lading dated 2-9-51 to 12-31-52)	$8,787.13
Nippon (38 bills of lading dated 9-19-51 to 11-26-52)	4,828.99
Fern-Ville (7 bills of lading dated 5-31-52 to 12-18-52)	1,079.86
Waterman (1 bill of lading dated 7-12-51)	10.17
Kokusai (9 bills of lading dated 11-11-51 to 9-30-52)	1,286.62
Mitsui (12 bills of lading dated 11-30-51 to 7-26-52)	2,290.35
States Marine (90 bills of lading dated 4-30-51 to 11-22-52)	11,483.17

Texas Cotton's complaint in No. 735 covers a similar cause of action naming the following common carriers by water and is for the purpose of recovering the reparations indicated for overcharges on bills of lading as follows:

Lykes (9 bills of lading dated 4-15-52 to 8-4-52)	$1,139.30
Nippon (1 bill of lading dated 11-28-52)	518.86

Fern-Ville (1 bill of lading dated 7-31-52)	311.42
Kokusai (1 bill of lading dated 9-30-52)	106.78
States Marine (3 bills of lading dated 5-27-52 to 8-15-52)	379.64

The carriers in docket Nos. 733, 734 and 735 were members of the Far East Conference.

The Mediterranean Conference is associated pursuant to a contract made on the 28th day of December 1929, first approved by the U.S. Shipping Board on January 23, 1930. It has operated under successive agreements and amendments, the latest of which was approved June 2, 1954 (Agreement No. 134-19). During the period of the actions covered by the complaint Mediterranean was operating under the conference contract as amended and approved to July 21, 1950. The conference contract of Mediterranean has never and does not now contain any provisions expressly authorizing the use of an exclusive patronage contract nor differentials in freight rates for contracting shippers. The record did not contain any minutes of meetings at which the contract and "dual" rate system was formally adopted by Mediterranean but the following two extracts from minutes established the existence of the practice on the dates of the actions referred to in the complaint:

1. *"TUESDAY, JUNE 21, 1949*

10:30 A.M.

E. S. BINNINGS
CHAIRMAN

* * *

CONFERENCE CONTRACTS ON COTTON

Gulf/French Atlantic Hamburg Range Freight Conference

Gulf/Mediterranean Ports Conference

"The Executive Secretary reported, verbally, to the meeting on what transpired since the joint meeting of the Conferences on June 16, 1949, in connection with the Conference contracts on Cotton.

* * *

"Considerable discussion was had and the States Marine Corporation was informed that the Conference Contract System on Cotton, which was unanimously approved by all members of the two Conferences, had already actually been established to become effective as of July 1, 1949, at the request of the Special Committee of the American Cotton Shippers Association, and after careful consideration and study by that Committee and the Cotton Committee of the Conferences.

* * *

"None of the other Member Lines of the Conferences would agree to suspending the contracts, for various reasons, including the fact that the contracts had been definitely announced to commence July 1, 1949 and, at the time of the meeting, more than forty-five (45) shippers had accepted the contracts.

* * *

"This subject was continued on the docket and the meeting recessed, subject to call by the Executive Secretary of the Conferences."

2. "CONFERENCE MEETING OF FEBRUARY 1, 1950" * * *

"Recordation is herein made that the Joint Conference Cotton Contract Committee and the Special Committee of the American Cotton Shippers Association, late in the afternoon of February 1, 1950, agreed on the following which was officially announced on behalf of the Gulf French Atlantic Hamburg Range Freight Conference and the Gulf Mediterranean Ports Conference by the Executive Secretary of those Conferences in a special letter dated Wednesday evening, February 1, 1950, to the Member Lines of the Conferences:

> "Effective as of February 2, 1950, through June 30, 1951, (repeat, nineteen fifty*one*), the date of the bill of lading to govern application of rates, *COTTON*, Basis High Density Bales, contract basis, $1.40 per 100 lbs., (Standard Compressed Bales $1.90 per 100 lbs.) to all ports in the French Atlantic (Bordeaux Dunkirk range), and Antwerp, Ghent, Rotterdam, Amsterdam, Bremen, Hamburg and all Mediterranean Base ports, including Spanish Mediterranean Base ports.
>
> "An addendum, in the form of a letter from the Executive Secretary, to cover this extension of the Conference Cotton Contracts, is being prepared and will be forwarded to all Cotton Contract signers (both shippers and receivers) for their necessary and prompt acceptance.
>
> "All other conditions of the Conference Cotton Contracts (Bordeaux Hamburg range and Mediterranean) remain unchanged."

The record disclosed no denial that Mediterranean followed the practice of offering exclusive patronage contracts and dual rates.

Far East is an association of common carriers by water in the foreign commerce of the United States act-

ing pursuant to a "Memorandum of Agreement" made between the parties signatory on the first day of September 1922, approved by the U.S. Shipping Board on November 14, 1922 (Agreement No. 17). At the times referred to in the complaints Far East was operating under such agreement as amended and approved through September 7, 1951. The contract contains no provisions expressly authorizing the use of an exclusive patronage contract or differentials in freight rates for contracting shippers.

Prior to the association evidenced by the 1922 memorandum of agreement, an agreement was reached in a conference of representatives of steamship lines and a representative of the U.S. Shipping Board Emergency Fleet Corporation at meetings on April 12 and April 19, 1920 concerning the obligations of carriers to each other with respect to their operations between North Atlantic ports in the U.S. and the Far East. The transcript of the minutes is the only evidence of the agreement. The minutes of the meeting refer to the assemblage as "Conference No. 17". At that time the carriers were all companies acting as managing agents of ships operated by the U.S. Shipping Board Emergency Fleet Corporation. A letter dated May 5, 1920 "relative to legality of the conferences" signed by the "Examiner in Charge, DIVISION OF REGULATIONS" of the Shipping Board refers to the transcript of minutes as follows:

> " * * * An examination of these papers does not disclose any objectionable features, they will be accepted and filed under Sec. 15 of the Federal Shipping Act and may be regarded as tentatively approved. Proceedings within the scope of this Conference as outlined in these papers will be lawful unless you shall be hereafter notified to the contrary.

"I note that you will arrange to forward to this office copies of future minutes, agreements, tariffs and rates as may be authorized by the Conference. * * * "

The record does not contain any further directives by the government concerning the filing of transcripts of minutes but the practice of submitting such papers to the government appears to have been followed thereafter. The Board's General Order No. 76, promulgated November 1952, however, requires filing of statements concerning the initiation of dual rate-contract arrangements by carriers. (See also *Sec. 15 Inquiry* 1 U.S.S.B. 121 (1927))

At the conclusion of hostilities in World War II cotton freight rates were controlled by a government agency until 1949 when commercial shipments of cotton were resumed but there was no offer of a rate differential until 1950.

The transcript of an extract from the minutes of a special meeting of Far East held on February 16, 1950 contains a statement that "This Special Meeting was called to hear further report of Conference Counsel with respect to Cotton contracts" and the following:

"On the question as to whether or not the Conference should proceed with the contract on Cotton, upon Motion seconded and carried it was unanimously agreed that the Chairman be instructed to mail the contract to the Cotton Shippers for their signature."

Special rate differentials for cotton shipped pursuant to exclusive patronage contracts are first evidenced by a routine tariff revision effective as of February 7, 1950 approved at a meeting on February 14, 1950 which was followed by the February 16 action noted above relative

to the issue of a contract to put the dual rate into effect.

Minutes of Conference meetings are reduced to writing and copies have been transmitted to the Federal Maritime Board or its predecessor agencies. Standard Board practice is to review these documents and, if action believed to be contrary to law is shown, to make the matter a subject of official correspondence or of formal proceedings. If no illegal actions are shown, the papers are filed and no further administrative action is taken. A transcript of minutes showing the action of Far East in extending its contract rate practice to include cotton was filed with the Board.

No minutes or memorandum or other evidence of any agreement to revise, rescind or revoke the foregoing action by either Conference had been filed with the Board by January 1, 1953.

Isbrandtsen (in No. 726) signed a "Memorandum of Agreement" made the 10th day of January 1946 with Far East and member carriers agreeing "in consideration of the rates and other conditions stated * * * to forward by vessels of the Carriers all shipments * * * to ports in Japan". Far East under date of October 1, 1948 sent contract shippers including Isbrandtsen proposed "Amendments to Conference Freight Contract" with the condition that "if you should omit to accept this proposal on or before November 1, 1948, we shall * * * terminate this agreement effective December 1, 1948 * * *." Isbrandtsen omitted to accept the proposal. No new agreement was made covering the period of the bills of lading in evidence. Isbrandtsen asked Far East for a contract for its August 1952 shipments but the Conference representative advised it would not permit Isbrandtsen to sign a contract to cover these shipments and States Marine

advised that even if Isbrandtsen obtained a freight contract, States Marine would not carry the cotton Isbrandtsen tendered.

Kempner (in No. 732) signed a "Memorandum of Agreement" made the 12th day of July 1949 with Mediterranean and member carriers agreeing "in consideration of the rates and other conditions stated * * * to offer * * * to the Carriers for transportation by them to all ports * * * served on the Mediterranean Sea * * * *". On May 16, 1950 Kempner was alleged to have shipped cotton on a non-conference ship and thereby to have failed to offer his cargo to the member carriers. After an exchange of telegrams and correspondence, beginning June 27, 1950, regarding this failure, Mediterranean by letter dated July 14, 1950 assessed damages pursuant to the agreement in the amount of $6,010.20, against Kempner and advised that failure to pay in 30 days would be cause for termination of Kempner's right to "contract rates" until paid as provided in the agreement. On July 27, 1950 Mediterranean advised Kempner that "the 'non-contract' basis of rates will be applicable effective on and after August 17, 1950". Kempner did not pay the damages assessed against it and has paid non-contract rates since August 17, 1950.

Kempner (in No. 733) signed a "Memorandum of Agreement" made the 7th day of February 1950 with Far East and member carriers designating therein under its signature as "Subsidiary, Associated and or Parent Companies" Galveston Cotton Company and agreeing "in consideration of the rates and other conditions stated * * * to forward by vessels of the Carriers all shipments made * * * to ports in Japan". By letter dated September 25, 1950 Kempner wrote Far East "we herewith tender our resignation from the Far East Conference

Agreement". The agreement provides that it "may be terminated upon 90 days written notice by the Shipper" (Kempner). The "resignation" was construed as a "termination" by the parties effective December 24, 1950. No new agreement was made covering the period of the bills of lading in evidence.

Neither Galveston (in No. 734) nor Texas Cotton (in No. 735) is a party in its own name to an exclusive patronage contract with either Far East or Mediterranean. Galveston is a Texas Corporation which is a wholly owned subsidiary of H. Kempner, a Massachusetts Trust. Texas Cotton is a Texas corporation and 50% of its stock is owned by H. Kempner.

Kempner never asked for a new shippers' contract and until this action never claimed a right to ship at contract rates.

On the dates of all the shipments forming the basis of complaints herein, no other adequate means were available to complainants to transport the shipments of cotton.

The differential between tariff rates for persons having exclusive patronage contracts for the transportation of cotton by Far East members and for those not having such contracts was $4.00 per ton and by Mediterranean carrier members was 20%.

Far East Conference carriers had however allowed shipments of other commodities by Isbrandtsen between New York and Japan at contract rates for a period of time immediately preceding August 1952. Such contract rates were extended to Isbrandtsen even though it was not a party to a shipper's exclusive patronage contract.

On the ships which carried Isbrandtsen's cotton at non contract rates, in August and September 1952, all of

the other cotton on board was carried at contract rates. During the period in question, the conference lines also shipped cotton for "spot" cotton brokers and forwarders at contract rates and considered such persons as shippers even though they did not own the cotton they shipped.

Isbrandtsen paid $13,373.96, the difference between the rate Kempner paid Isbrandtsen and the non contract rate paid by Isbrandtsen for shipping Kempner's cotton. Isbrandtsen did not pass on to the buyer the extra freight paid to the conference lines.

The following is a summary of outside competition met by conference lines in the Gulf-Far East trade during the period 1949-1955: In 1949, 4 non-conference liner sailings and 34 tramp sailings; in 1950, 15 non-conference liner sailings, and 29 tramp sailings; in 1951, a non-conference liner sailing applying conference contract rates, and 38 tramp sailings; in 1952, 54 tramp sailings; in 1953, 5 non-conference liner sailings, and 68 tramp sailings; in 1954, one non-conference liner sailing, and 77 tramp sailings; and in 1955, 61 tramp sailings.

Discussion

The complainants in all five of these proceedings seek to have the "dual rate contract arrangement" in use by Far East and Mediterranean made illegal under the Act.

The complainants after alleging the use of "dual rate, contract non-contract system" in the Far East and Mediterranean trades state that such system is unlawful for the following reasons: 1. the use of the system contravenes the provisions of Sec. 14 of the Act; 2. the use of the form of shipper's contract and of rate differentials in the tariffs of the conferences has never been approved by the Board under Sec. 15 of the Act and may not be

approved under Sec. 15; 3. the system and the dual rates used are unduly and unreasonably prejudicial and disadvantageous to persons in violation of Sec. 16 of the Act; and 4. the system (this term is used herein interchangeably with "arrangement") and the dual rates used are unjustly discriminatory between shippers and are unjustly prejudicial to exporters of the United States in violation of Sec. 17 of the Act.

If the arrangements have been agreed to by common carriers by water and thereafter carried out in whole or in part without Board approval, the arrangements are illegal for this reason under Sec. 15 and for no other reason. If the arrangements embodied in agreements have been approved by the Board, on the other hand, it cannot be argued here that the arrangements are illegal unless a court has interpreted the Act to say so, notwithstanding the Board's approval. If any Court has done so, we hold as hereinafter noted, that Sec. 14 of the Act restricts our authority to construe or apply the Act to make unlawful any dual rate contract arrangement in use on May 19, 1958. (The "arrangement" or "system" referred to herein consists of conference action to (1) adopt and tender to shippers an exclusive patronage contract and (2) issue tariffs containing rate differentials for contracting shippers.)

The procedure by which agreements between carriers are declared legal or illegal under the Act is that they be 1. filed with the Board pursuant to Sec. 15; 2. reviewed; and 3. passed on for legality. There is no filing requirement until there is an agreement or a meeting of minds by two or more common carriers by water or other persons subject to the Act regarding activities described in Sec. 15. Until common carriers by water or other persons subject to the Act agree to put rate differentials

into effect and to tender shippers exclusive patronage contracts, the so-called "arrangement" is a trade practice or simply a part of the commercial environment in which common carriers by water and other persons subject to the Act operate. The trade practice must be distinguished from agreements. The "arrangement" is put into effect through agreements, commodity by commodity, as the needs of the trade appear to dictate. In the present case the cotton shippers wanted a contract and the conference, as the minutes herein show, put the arrangement into effect by the actions at conference meetings. Agreements came into being at the time the common carriers by water which are members of Far East and Mediterranean agreed to offer cotton shippers rate differentials by means of tariff revisions and to tender them exclusive patronage contracts. Complainants, in effect, challenged the validity of the actions evidenced by the meetings of Far East on February 16, 1950, and of Mediterranean on February 1, 1950, when they assert the unlawfulness of the "dual rate exclusive patronage contract." If the agreements reached at these meetings violate any provision of the Act or operate to the detriment of the commerce of the United States or are unjustly discriminatory or unfair as between carriers and shippers they may be disapproved by the Board. If the "practice", "system" or "arrangement" resulting from these agreements violates any provision of the Act the Board may also award complainants reparations under Sec. 22 for the injury, if any, caused by the violation.

The facts showing that Mediterranean filed and obtained Board approval of a conference contract and filed transcripts of minutes of its meetings showing agreement among its members for the adoption of the practice of offering dual rates and exclusive patronage contracts

and filed tariffs containing dual rate provisions establishes that Mediterranean has filed an agreement pursuant to Sec. 15. The fact that Far East also filed transcripts of extracts from the minutes of its meetings showing adoption of the practice of offering dual rates and exclusive patronage contracts for cotton shippers as well as the filing of tariffs showing dual rates established that Far East filed its agreements pursuant to Sec. 15. These transcripts have been reviewed by the Board's staff and no exception taken thereto. Board approval of both agreements is required, *Isbrandtsen Co. Inc. v. U. S.*, 211 F. 2d 51 (1954), cert. den. 347 U.S. 990 (1954), and approval has been given. The Board's approval was neither subsequent nor retroactive, but existed at the time it accepted tariff changes showing dual rates and did not disapprove the results of the conference meetings and the tariff revisions by order. *Empire State Highway Transport Assn. v. F.M.B., U.S.A. and American Export Lines, Inc.*, U.S.C.A., D.C. Cir. April 27, 1961.

The Board has followed for many years the administrative practice of initiating proceedings and of issuing orders where agreements were to be disapproved under Sec. 15 and where organic agreements and modifications thereof are approved. *Section 15 Inquiry* 1 U.S.S.B. 121 (1927).

Sec. 15 authorizes the Board to disapprove by order, but not approve by order. All other agreements may simply be approved. Approval has been tacit where no action was taken and no order was issued, and this has always been considered as appropriate and consistent with Sec. 15. *Section 15 Inquiry* (*supra*). Other forms of approval by the issue of written statements have heretofore not been considered a necessary technique of administering the Act. Limitations of staff compelled

the use of the technique which was followed. Since the decision in *Isbrandtsen Co. Inc. v. U. S.* (*supra*) and *River Plate & Brazil Conferences v. Pressed Steel Car Co. Inc.*, 227 F. 2d 60 (2d Cir. 1950), however, new approval procedures have been instituted.

The purpose of filing agreements under Sec. 15 of the Act is to give the Board the opportunity to review the agreements to determine their conformity with the standards specified in Sec. 15. The complaint is that such a review will show the agreement to use the dual rate exclusive patronage contract system by common carriers by water does not conform; and particularly that it violates Sec. 14 of the Act. This contention has been reviewed in the past by the courts in several cases, but none of the cases declare the practice or system unauthorized under all circumstances. In *U. S. Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932), the plaintiff sought to enjoin the defendant steamship lines from using the contract rate system on the ground that such practice violated the Sherman Anti-Trust Act, C. 647, 26 Stat. 209, Title 15, U.S.C. §§ 1-7 and the Clayton Act, C. 323, 38 Stat. 730, Title 15, U.S.C. §§ 12-27. The decree dismissing the bill of complaint was affirmed on the ground that the Act covers the dominant facts alleged as constituting a violation of the Anti-Trust Acts, particularly Sec. 14 of the Act which prohibits retaliation by common carriers by water against a shipper by resorting to discriminating or unfair methods. If the system were illegal under any circumstances, the dismissal because of the Board's primary jurisdiction would have been a useless action and the court should have passed on the issue then and there. The case of *Swayne & Hoyt Ltd. v. U. S.*, 300 U.S. 297 (1937) involved an appeal from an order of the Secretary of Commerce. The Secretary's order had

enjoined the use of the exclusive patronage contract rate system in the intercoastal trade on the ground that, as he interpreted the evidence, the operation of the contract system in the circumstances of the case would not differ substantially from the deferred rebate system outlawed in both foreign and coastwise shipping by Sec. 14 of the Act. This case is not authority for the conclusion that any contract rate system is unlawful. The court said: "Even though, as appellants seem to argue, the evidence may lend itself to support a different inference, we are without authority to substitute our judgment for that of the Secretary that the discrimination was unreasonable." (P. 307.) Unreasonable discrimination, not illegality under any circumstance, was the basis of the decision.

In *Isbrandtsen Co. v. United States*, 96 F. Supp. 883 (U.S. D.C. So. Dist. N.Y.) (1951) Aff'd Sup. Ct. 342 U.S. 950 per curiam (1952) the facts showed that the North Atlantic Continental Freight Conference on October 1, 1948, "sent notices to all known shippers in the North Atlantic trade that effective November 1, 1948, the exclusive patronage contract-noncontract rate system would be inaugurated and that shippers who refused to enter into contracts to ship with the conference lines exclusively when they could provide transportation were to be charged 20% to 30% higher than the contract rates." The Board by its order of December 1, 1950 (3 F.M.B. 235) dismissed a complaint alleging illegality in such action. The plaintiff Isbrandtsen, the Attorney General and the Secretary of Agriculture joined in contending "that in no circumstances can a dual rate provision (i.e., exclusive patronage, or dual rate, or contract-noncontract provision) in a conference agreement be valid" under Sec. 14. The court said "for the purposes of this decision we assume that, as the Board contends, under some circum-

stances the Board may, pursuant to 46 U.S.C.A. § 814 approve a conference agreement containing such a provision." The court however set aside the Board's order and enjoined the conference from acting pursuant to the dual rate provision on the ground that the 20% to 30% differential in rates had been arbitrarily selected and decided that the Board itself made the examiner's finding to this effect its own. The case was appealed to the Supreme Court which affirmed the decision of the District Court without opinion in *A/S.J. Ludwig Mowinckels Redeir. v. Isbrandtsen Co.*, 342 U.S. 950, (1952). In *Far East Conference v. United States*, 342 U.S. 570 (1952) the Attorney General brought a suit under the Sherman Anti-Trust Act (*Supra*) to enjoin defendants from using the exclusive patronage contract rate system. The important distinction between this case and the *Cunard* case above was that now the government rather than a private shipper was seeking to enjoin the maintenance of dual rates. This fact was held to be immaterial and since the Board was the expert agency responsible for administering the Act, the court held that administrative remedies before the Board must be exhausted before resort may be had before the courts. Here again the court declined to hold that the contract rate system was unlawful under any circumstances.

Up to this point we do not construe any of these decisions as outlawing the trade practice of common carriers by water agreeing to tender shippers exclusive patronage contracts which provide for less than tariff rates and of issuing tariffs containing rate differentials for shippers having exclusive patronage contracts. We construe the present status of the law as follows: 1. where an issue as to the validity of agreements among common carriers by water to use exclusive patronage contracts and dual rates is concerned, the complaint and facts must

first be presented ot the Board for decision; 2. where we find the operation of an exclusive patronage dual rate system has the effect of creating deferred rebates or unreasonable discrimination, we must hold the agreement to maintain the system is unlawful; 3. dual rate differentials which are arbitrarily selected must be held invalid; and 4. a dual rate system which is agreed to for the purpose of curtailing competition and an agreement to offer an exclusive patronage contract containing provisions tying shippers in such a way as to have the effect of stifling outside competition must both be held unlawful.

Finally on May 19, 1958, the Supreme Court in *Maritime Board v Isbrandtsen Co. Inc.*, 356 U.S. 481 (1958) passed on the issue of illegality under all circumstances. Isbrandtsen filed a petition to review an order of the Board in Docket No. 730 *Contract-Rates-Japan/Atlantic-Gulf Freight Conference*, 4 F.M.B. 706 (1955) that the agreement embodied in a statement filed by the Conference be approved under Sec. 15 of the Act. The Conference's statement proposed to initiate an exclusive patronage contract/non-contract freight rate system (dual rate system) in the trade from Japan, Korea and Okinawa to U. S. Gulf Ports and Atlantic Coast Ports. The Court held: "In view of the fact that in the present case the dual-rate system was instituted for the purpose of curtailing Isbrandtsen's competition, thus becoming a device made illegal by Congress in § 14 Third, we need not give controlling weight to the various treatments of dual rates by the Board under different circumstances." The Court had stated that: "Ties to shippers not designed to have the effect of stifling outside competition are not made unlawful. Whether a particular tie is designed to have the effect of stifling outside competition is a question for the Board in the first instance to determine." The cir-

cumstances here were that the conference was trying to stifle outside competition.

Our approval of the Mediterranean and Far East conference agreements and of their subsequent agreements to initiate the exclusive patronage contract dual rate system to the carriage of cotton, and the consistency of such approval with court decisions has been noted above. The main question now is whether our former approval must be revised as a result of the last Isbrandtsen decision.

The complainants' claim is that we now lack authority to approve a dual rate system because Sec. 14 Third provides that no common carrier by water shall "Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier * * * or for any other reason."

The Circuit Court had stated "since the dual rate system here constitutes retaliation it must be condemned without regard to the question of its reasonableness, as are deferred rebates." *Isbrandtsen Co. Inc. v. United States*, 239 F. 2d 933 (U.S.C.A., D.C. 1956), Cert. granted 353 U.S. 908 (1957). The Supreme Court affirmed the result which was to set aside the Board's orders "insofar as they approve the exclusive patronage contract non-contract rate system" of the Japan-Atlantic & Gulf Freight Conference, but for different reasons it held that Sec. 14 Third "strikes down dual-rate systems only where they are employed as predatory devices", and precise findings by the Board "as to a particular system's intent and effect" are essential to a judicial determination of a system's validity under the statute. *Isbrandtsen* at p. 499.

We are called on to make precise findings as to the intent and effect of the arrangement as a result of the *Isbrandtsen* decision, and of respondents' (Far East) motion to remand the record and the recommended decision filed November 3, 1958 after the *Isbrandtsen* decision, to decide whether the arrangement should now be disapproved as a result of the findings herein about the system's intent and effect and to decide whether our former approval should be revoked.

On August 12, 1958, Congress enacted P.L. 85-626, 72 Stat. 574 "amending the section of the Shipping Act on which the *Isbrandtsen* decision was based, [Sec. 14] so as to hold valid any dual rate contract arrangement in use by the members of a Conference on May 19, 1958" *Anglo Canadian Shipping Co. Ltd. et al v. United States*, 264 F. 2d 405 (U.S.C.A. 9th, February 18, 1959).

Before discussing the effect of P.L. 85-626 and the amendment of Sec. 14 Third on complainants' claims, on the precise findings required and on the Isbrandtsen decisions a short summary of the history of the trade practice and of agreements relating to exclusive patronage contracts and dual rates will throw some light on the retaliatory, predatory and discriminatory aspects of the arrangement and on its intent and effect.

Steamship freight conferences came into being in 1875 to provide regular services and fixed rates of freight which were the same to all shippers. In return for regular service and stable rates, the associated steamship lines sought assurances from shippers of their exclusive support for all members of the conference. Shippers supporting the conferences also sought preferential freight rates over those who did not. The assurances of support took two forms: the deferred rebate system and the con-

tract system and rate differential. Under the deferred rebate system, shippers who confined their shipments to conference lines for stated periods can claim a rebate at the end of each period measured as a percentage of the freight paid and payable at a later date. Under the contract system shippers are required to sign a contract in advance and to confine all their shipments to conference lines. In return they either receive a discount on freight rates or else lower rates of freight than non-contractors. Penalties are usually prescribed for violation of the contract.

Two significant conclusions emerge from this summary: first, the use of exclusive patronage contracts providing for less than tariff rates was an established trade practice long before the Act, in 1916, and existed at the time of the Act, and, second, the trade practice was brought about principally in response to demands of shippers rather than as a result of conference efforts to improve the members' competitive position vis-a-vis outsiders. The intent and effect of the dual rate contract traditionally is not to meet outside competition. The conference agreements between carriers may have been designed to regulate competition, but not the exclusive patronage contract between carriers and shippers nor the differential in freight rates which the contract provided. The carrier-shipper relation is the only one involved here. The inter-carrier relation was involved in the Isbrandtsen case.

The trade practice of requiring a shipper tie to a conference by means of the contract and rate differentials for contracting shippers is what has come to be known as a "contract system" or as the "dual rate system" or the "exclusive patronage dual rate contract noncontract system" or a "dual rate contract arrangement".

Since this trade practice was so well known in American and British ocean commerce by 1916, it would have been anomalous for Congress in 1916 to outlaw the system by inference rather than expressly as it did in the case of rebates.

Since 1916 the public policy aspects of shippers' contracts and rate differentials as trade practices have not been successfully challenged. Certain aspects of the arrangement such as excessive rate differentials have been invalidated because they were "arbitrarily" selected *A/S J. Ludwig Mowinckels Redeir v. Isbrandtsen Co.* (*Supra*) or were undue or unreasonable *Swayne and Hoyt Ltd. v. United States* (*Supra*); the administrative procedures or formality of approval under Sec. 15 have been declared improper, *River Plate & Brazil Conference v. Pressed Steel Car Co. Inc.* (*Supra*) and the U.S. Shipping Board has condemned the arrangement where it operates solely to effect a monopoly *Eden Mining Co. v. Bluefields Fruit SS Co.*, 1 U.S.S.B. 41 (1922) but the trade practice itself had never been declared invalid "per se" until the Circuit Court of Appeals said so in the *Isbrandtsen* case (239 F. 2d 933) in 1956. This unqualified holding however does not appear to us to have been fully sustained by the Supreme Court in 1958.

We are inclined to believe that the latest *Isbrandtsen* case did not affirm that part of the Circuit Court decision (239 F. 2d 933) which set aside the Board's orders "in so far as they approve the exclusive patronage contract non-contract rate system" as a general proposition, but affirmed such decision only to the extent of disapproving the Japan-Atlantic and Gulf Freight Conference arrangement which used the particular shippers' contract to injure the plaintiff, an independent common carrier by water.

Up to this point and until 1958, a period of about 83 years following the formation of the first shipping conference in 1875, the shippers' exclusive patronage contract and rate differentials have survived legislative inquiry and judicial scrutiny in both Great Britain and America without being found to be a retaliatory device and as such sufficiently contrary to public policy to justify remedial legislation or adverse court orders.

In 1958, in the *Isbrandtsen* case, the Supreme Court concluded, on the premise of our finding the dual rate contract of the Japan-Atlantic and Gulf Freight Conference was a necessary competitive means to offset the effect of Isbrandtsen's non-conference competition, that the arrangement was a resort to other discriminatory or unfair methods in violation of Sec. 14 Third of the Act.

Notwithstanding 1. the special facts of the present case showing there have been no unjustified reductions in freight rates (i.e. "rate cutting"), 2. the fact that shippers, and not carriers, are complainants herein, and 3. the absence of significant independent liner competition for cotton out of the Gulf since World War II, all of which alter the premises herein, the complainants and respondents adopted differing views about the effect of the *Isbrandtsen* decision.

Insofar as the decision invalidated practices heretofore generally used for over 83 years in the seaborne foreign commerce of the U.S., it had a profound effect upon the industry and action by Congress followed. The cause for Congressional action was stated in the report of the Senate Committee on Interstate and Foreign Commerce to accompany S. 3916 (Report 1709, Senate, 85th Cong., 2d Sess.) as follows: "Whether the above language from the Court's opinion would justify operation of a dual-

rate system if it is not directed at a non-conference competitor or competitors, or whether, as Justice Frankfurter construed it in a dissenting opinion, it declares illegal all dual-rate systems, is certainly not clear. About the only point rendered unmistakably clear by the two opinions is that, as a result of the Court's decision, the shipping industry is likely to be plagued with widespread confusion and endless litigation over the months, and possibly years, ahead."

After the Supreme Court decision on May 19, 1958, and the Committee's Report on June 13, 1958, Congress enacted Public Law 85-626 (72 Stat. 574) which, as amended by Public Law 86-542 (74 Stat. 253), and by Public Law 87-75 (75 Stat. 195), amended Sec. 14 Third of the Act to provide that nothing in the Act "shall be construed or applied to forbid or make unlawful any dual rate contract arrangement in use by the members of a conference on May 19, 1958 which conference is organized under an agreement approved under section 15 of this Act" by the Board unless and until the Board disapproves or modifies the arrangement in accordance with the standards of Sec. 15 of the Act. This amendment is in effect until September 15, 1961.

The Committee's action put a stop to litigation over the effect of the *Isbrandtsen* decision, but in its place, litigation began over the interpretation of the amendment of Sec. 14 Third of the Act. The New York Supreme Court in *Pasch v. Chemoleum Corp.*, 209 N.Y. Supp. 191 (N. Y. Sup. Ct. Oct. 11, 1960) had the following to say about the effect of the amendment:

"The legislative history of this amendment makes plain the intention of Congress, by this legislation, to provide the industry with a moratorium during which

Congress might study and investigate, to the end that appropriate legislation might thereafter be enacted. Petitioner asserts the amendment preserves the validity of the dual rate contracts now under consideration. Respondents argue to the contrary and contend the amendment was intended to do no more than preserve the status quo that had been disturbed by the adjudication of the Supreme Court of the United States in the later *Isbrandtsen* case; that it was not the intention of Congress to limit the effects of the adjudication in the earlier *Isbrandtsen* case, and, as a consequence, the amendment must be deemed to include the qualification that exclusive patronage-dual rate contracts must, in any event, have been approved by the Federal Maritime Board to acquire validity.

"I reach a different conclusion. Respondents' contention as to the meaning of the amendment works a distortion in the language employed by Congress which plainly states * * * unless and until such regulatory body disapproves, cancels or modifies such arrangement in accordance with the standards set forth in section 15 of this Act. It would have been a simple matter for Congress, if it desired to do so, to insert appropriate language in the amendment limiting the validity of the dual rate contracts to those actually approved by the Board. It is incredible to assume that Congress was wholly unaware of the earlier *Isbrandtsen* case when it enacted the legislation. I conclude Congress neither intended nor desired to limit the effect of the amendment in the manner suggested by respondents."

Later the following on this case was stated by Justice McGivern in *Pasch v. Chemoleum Corporation*, 210 N.Y.S. 2d 738 (1960) before the Appeals Division of the Supreme Court:

"In any event, any infirmity which may have existed in the contract was cured by the enactment on August 12, 1958, of Public Law 85-626 (72 Stat. 574) which amended section 14 of the Shipping Act (46 U.S.C. 812).

"The dual rate contract arrangement of petitioner was in existence on May 19, 1958, and it is conceded that the conference was one organized under an agreement approved under section 15 of the Shipping Act by the regulatory body administering the act. Under the circumstances, in the absence of any evidence that the regulatory body has disapproved, canceled, or modified the dual rate contract form theretofore filed with it on February 26, 1953, by petitioner in compliance with the regulatory body's General Order 76, directing it to supply complete information as to the dual rate contract arrangement then in force, this court must find the contract executed by petitioner and respondent valid." (P. 742).

More recent support for this conclusion is found in the Report of the Committee on Merchant Marine and Fisheries to accompany H.R. 6775, on June 8, 1961 (87th Cong. 1st Sess. House of Representatives, Report No. 498) interpreting Sec. 14 Third of the Act as amended by P.L. 85-626 in 1958 and P.L. 86-542 in 1959, as follows:

"In view of the grave doubts cast by the Supreme Court decision upon the legality of the dual rate system and the possible detrimental results to both American shipping and American foreign commerce, legislation was enacted in the 2d session of the 85th Congress to authorize the *continuation in force* of any existing dual rate contract arrangement until June 30, 1960." (emphasis supplied).

The arrangement of Far East and Mediterranean

was in use by members of the Conference on May 19, 1958. The Conferences were organized under agreements approved under Sec. 15 of the Act. Sec. 15 requires an order if the Board is to disapprove an agreement. The standards for determining the lawfulness of an arrangement set forth in Sec. 15 are: 1. is the arrangement unjustly discriminatory or unfair as between shippers and carriers; 2. does the arrangement operate to the detriment of the commerce of the U. S.; and 3. is the arrangement in violation of the Act?

We have found that the arrangements of Mediterranean and Far East are embodied in arrangements heretofore approved by the Board and in use by the members of the conferences on May 19, 1958. The question now is whether we should disapprove or modify these arrangements by revoking our prior approval.

On the present record no independent common carrier by water is complaining of the retaliatory or predatory effect of the arrangement. Instead, as shown in complainant's memorandum, in recent oral argument before us and in the exceptions and replies filed after the Isbrandtsen decision, it is argued by a group of shippers that the historically established trade practices are contrary to public policy and were outlawed by Congress in Sec. 14 of the Act. The Supreme Court, however, only found that the arrangement of the Japan-Atlantic and Gulf Freight Conference used the shippers' contract and its dual rates as a predatory device and as evidence thereof referred to a shippers' exclusive patronage contract containing oppressive conditions. The Court stated: " * * * the dual-rate contracts here require the carriers to carry the shipper's cargo only 'so far as their regular services are available'; rates are 'subject to reasonable increase' within two calendar months plus the unexpired

portion of the month after notice of increase is given; '[e]ach Member of the Conference is responsible for its own part only in this Agreement'; the agreement is terminable by either party on three months' notice; and for a breach, 'the Shipper shall pay as liquidated damages to the Carriers fifty per centum (50%) of the amount of freight which the Shipper would have paid had such shipment been made in a vessel of the Carriers at the Contract rate currently in effect.' Until payment of the liquidated damages the shipper is denied the reduced rate, and if he violates the agreement more than once in 12 months, he suffers cancellation of the agreement and the denial of another until all liquidated damages have been paid in full." The shippers' contracts in this record are similar to the shippers' contracts before the Supreme Court.

Because of this similarity with the contracts in this record and the Court's inference therefrom that such an oppressive contract plus a dual rate system constitutes a predatory device, it is argued that we should hold that the actions of Mediterranean and Far East violate Sec. 14 although as far as this record is concerned there is no evidence whatever that the carrier's actions in adopting the shippers' contract and the dual rate was directed at any other carrier.

The circumstances of this case are that the shippers' contract was asked for by the shippers themselves. The contract was not adopted as an anti-outside-carrier device but as an accommodation to shippers desiring stable conditions in the trade which would give them assured service at reasonably firm and level rates for predictable periods. We find no evidence in this record to show that the drafting and tender of the shippers' contract or that the rate differential established in the published and filed tariffs

was a competitive device, was designed to stifle outside competition or even had this effect. No carrier introduced any evidence to this effect.

The absence of substantial non-conference liner competition and the absence of any complaint by carriers in independent non-conference liner service and the circumstances under which cotton shippers negotiated the exclusive patronage contracts, lead us to conclude that the arrangement herein was not unjustly discriminatory or unfair between shippers and carriers, was not retaliatory, did not stifle outside carrier competition and does not violate the Act.

The examiner has found that the differentials in rates of each conference are not discriminatory or unfair or detrimental to the commerce of the U. S. or in violation of the Act. We have reviewed the record of the facts on which this finding is based, have no disagreement therewith and concur with the examiner's finding.

In view of the history of the exclusive patronage contract and rate differential arrangements, we conclude that such arrangement does not operate to the detriment of the commerce of the U. S. We conclude further that the dual rate and exclusive patronage contract herein was not a resort to other discriminatory or unfair methods against the shipper complainants herein in violation of Sec. 14 of the Act. We find no reason to disapprove the agreements of Far East and Mediterranean heretofore filed with the Board.

We conclude further that "system and rates thereunder" are not unduly and unreasonably prejudicial and disadvantageous to persons in violation of Sec. 16 of the Act and are not unjustly discriminatory between shippers

and unjustly prejudicial to exporters of the United States in violation of Sec. 17 of the Act as claimed in respondents' complaints.

The complainants also asked for reparations based on violations of the Act.

The facts showing that APL, East Asiatic, Maersk and NYK gave Isbrandtsen the lower contract rates without the necessity for a contract and then in August and September other conference members demanded the payment of non-contract rates established that Isbrandtsen was discriminated against by States Marine and Waterman in violation of Sec. 17 of the Act. Sec. 17 forbids any common carrier by water in foreign commerce from charging any rate which is unjustly discriminatory between shippers. States Marine and Waterman as members of Far East failed to extend to Isbrandtsen the same rates which other conference members had granted earlier.

Respondents claim that Isbrandtsen is not a shipper and therefore cannot claim that he has been discriminated against as a shipper. Isbrandtsen's name appears as the shipper on the bills of lading in evidence, signed by the masters of respondent's ships, the cargo described thereon was taken aboard and transported and Isbrandtsen's freight payments as shipper were accepted. Isbrandsten's name also appears on all other shipping documents. As a shipper Isbrandtsen tried to get a contract and contract rates but was refused both. At the same time, States Marine and Waterman were carrying the same kind of cotton for other shippers at contract rates, under identical conditions. States Marine and Waterman refused to give Isbrandtsen similar rates. As a result of these actions, Isbrandtsen was charged a rate which was unjustly discriminatory between shippers. Isbrandtsen showed further that it incurred expenses, lost profits and

suffered damage to the extent of its out-of-pocket expenses at the result of the denial of a contract and payment of the higher rates. *Eden Mining v. Bluefields* at 1 U.S.S.B. 41 (1922). Respondents did not prove any mitigating factors affecting Isbrandtsen's damage although the burden was on them to do so. *Roberto Hernandez Inc. v. Arnold Bernstein, Etc.*, 116 F. 2d 849 (C.C.A. 2d 1941 cert. den. 313 U.S. 582 (1941).

Kempner and Galveston signed a shippers' contract on February 7, 1950, and terminated their contract September 25, 1950, effective 90 days later on December 24, 1950, as shown. Unlike Isbrandtsen, no new contract was requested. These respondents were never unjustly refused a contract rate. Consequently, for shipments made during and after January 1951, Kempner and Galveston could not claim status as contract shippers and were not discriminated against. Kempner and Galveston were not given the lower contract rates during any period when they did not have a contract.

Texas Cotton never had a shippers' contract with either Mediterranean or Far East. Kempner in the only Far East shippers' contract it had did not list Texas Cotton as a subsidiary, affiliate or parent company. No contract existed at any time on which Texas Cotton either assumed the obligations to patronize the conference exclusively or acquired the right to ship at the lower contract rates either independently or as a subsidiary. This respondent was never unjustly refused a contract rate.

Since none of the complainants in Dockets No. 732, 733, 734 and 735 could validly claim status as contract shippers, nor even received contract shippers' rates during a period when they did not have a contract, there has been no discrimination against such complainants.

Isbrandtsen's claim for reparations under Sec. 22 of the Act has been found to be the result of discrimination. We have recently held that "over-charges and discriminations have quite different consequences as far as reparation is concerned. A different measure of recovery applies where the shipper has paid the applicable rate (non contract) and sues upon the discrimination caused by other shippers having to pay less or by being unjustly refused the contract rate." *Swift & Co. and Swift & Co. Packers v. Gulf & South Atlantic, Havana SS Co. et al.*, 6 F.M.B. , decided February 2, 1961. In the *Swift* case the complainant was given the opportunity to prove its damages at a further hearing. Although the basis for the decisions are the same, such further proceeding is not necessary here because Isbrandtsen has only asked for the sum of $5,455, with interest, from respondent States Marine Corp. of Delaware and $1,232.28, with interest, from the respondent Waterman SS Corp. In the *Swift* case complainants had asked for reparations and other relief as a result of the damage suffered from the enforcement by the conference of certain contract provisions against Swift. Accordingly, States Marine and Waterman will be ordered to pay to complainant Isbrandtsen on or before 60 days from the date of our Order $6,687.28 with interest at the rate of 6% per annum on any amount unpaid after 60 days as reparation from the injury caused by the respondent's violation of Section 17 of the Act.

We have reviewed the record as well as the conclusions of the Supreme Court in the second *Isbrandtsen* case and the subsequent relevant Acts of Congress. Under the circumstances, it is not considered that the motion of respondents, other than Isthmian Steamship Company, to remand the record and the recommended decision to

the chief examiner with the directions to rule on additional findings should be granted. The motion will be denied.

After due investigation and hearing, our conclusion in respect to the five complaints are as follows:

1. Complainant Isbrandtsen in Docket No. 726:

a. has proven its complaint of a violation of Sec. 17 of the Act by States Marine Corp. of Delaware, a common carrier by water, and shall be paid on or before 60 days from the date of our order herein with interest at the rate of 6% per annum for every day after such 60 days until paid, the sum of $5,455. as reparation for the injury caused by said violation;

b. has proven its complaint of a violation of Sec. 17 of the Act by Waterman SS Corp., a common carrier by water, and shall be paid on or before 60 days from the date of our order herein with interest at the rate of 6% per annum for every day after such 60 days until paid, the sum of $1,282.28 as reparation for the injury caused by said violation;

c. has not established that respondents should be ordered to cease and desist from using the exclusive patronage dual rate contract non-contract system, or such contract with shippers, or from using the spread and differential of four dollars ($4.00) per ton and any other spread or differential between contract and non-contract tariff rates or participating in such contracts;

d. is not entitled to any other additional and further relief;

2. Complainant Kempner in Docket No. 732:

a. has not proven its complaint of a violation of the Act by Lykes Bros. SS Co. Inc.;

b. has not proven its complaint of a violation of the Act by Kerr Steamship Company;

c. has not proven its complaint of a violation of the Act by States Marine Corporation of Delaware;

d. has not proven its complaint of a violation of the Act by Societa Italiana de Armamento "SIDARMA";

e. has not proven its complaint of a violation of the Act by Compania Maritima del Nervion;

f. has not proven its complaint of a violation of the Act by Societa Anonima Navigazione Alta Italia, Ltd., Genoa (Creole Line);

g. has not established that respondents should be ordered to cease and desist from the violations of the Act complained of or from using a dual rate contract/non-contract type of tariff involving a spread or differential now being charged or any other differential or charge which will not be available to contract and non-contract shippers alike;

h. is not entitled to any other and further relief.

An order dismissing the complaint will be entered.

3. Complainant Kempner in Docket No. 733:

a. has not proven its complaint of a violation of the Act against Lykes Bros. Steamship Co., Inc.;

b. has not proven its complaint of a violation of the Act by States Marine Corp. of Delaware;

c. has not proven its complaint of a violation of the Act by Kokusai Lines Joint Service;

d. has not proven its complaint of a violation of the Act by Mitsui Steamship Co., Ltd.;

e. has not proven it complaint of a violation of the Act by Kawasaki Kisin Kaisha, Ltd.;

f. has not proven its complaint of a violation of the Act by Nippon Yusen Kaisha, Ltd.;

g. has not proven its complaint of a violation of the Act by Fern-Ville Far East Lines/Barber-Fern-Ville Lines—Fearnley & Eger and A. F. Klaveness & Co. A/S;

h. has not established that respondents should be ordered to cease and desist from the violations of the Act complained of or from using a dual rate contract non-contract type of tariff involving a spread or differential now being charged or any other differential or charge which will not be available to contract and non-contract shippers alike;

i. is not entitled to any other and further relief.

An order dismissing the complaint will be entered.

4. Complainant Galveston Cotton Co. in Docket No. 734:

a. has not proven its complaint of a violation of the Act by Lykes Bros. Steamship Co., Inc.;

b. has not proven its complaint of a violation of the Act by Nippon Yusen Kaisha, Ltd.;

c. has not proven its complaint of a violation of the Act by Fern-Ville Far East Lines/Barber-Fern-Ville Lines—Fearnley & Egar and A. F. Klaveness & Company, A/S;

d. has not proven its complaint of a violation of the Act by Waterman Steamship Corp.;

e. has not proven its complaint of a violation of the Act by Kokusai Lines Joint Service;

f. has not proven its complaint of a violation of the Act by Mitsui Steamship Company, Ltd.;

g. has not proven its complaint of a violation of the Act by States Marine Corp. of Delaware;

h. has not established that respondent should be ordered to cease and desist from the violations of the Act complained of or from using a dual rate contract non-contract type of tariff involving a spread or differential now being charged or any other differential or charge which will not be available to contract and non-contract shippers alike;

i. is not entitled to any other and further relief.

j. An order dismissing the complaint will be entered.

5. Complainant Texas Cotton Industries in Docket No. 735:

a. has not proven its complaint of a violation of the Act by Lykes Bros. Steamship Co., Inc., et al;

b. has not established that respondent should be ordered to cease and desist from the violations of the Act complained of or from using a dual rate contract non-contract type of tariff involving a spread or differential now being charged or any other differential or charge which will not be available to contract and non-contract shippers alike:

c. is not entitled to any other and further relief.

An order dismissing the complaint will be entered.

/s Thomas Lisi
Thomas Lisi
Secretary

APPENDIX "B"

Majority and Dissenting Opinions and Order of the United States Court of Appeals for the District of Columbia Circuit

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,658

H. KEMPNER, GALVESTON COTTON COMPANY AND TEXAS COTTON INDUSTRIES,
Petitioners

v.

FEDERAL MARITIME COMMISSION (formerly FEDERAL MARITIME BOARD) and UNITED STATES OF AMERICA,
Respondents

GULF/MEDITERRANEAN PORTS CONFERENCE, ET AL., The Common Carriers by Water, Members of THE FAR EAST CONFERENCE,
Intervenors

Petition for Review of an Order of the Federal Maritime Commission

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Decided January 10, 1963

Mr. Shelby Fitze, with whom *Messrs. Delmar W. Holloman* and *James T. Welch* were on the brief, for petitioners.

Mr. Paul D. Page, Jr., Attorney, Federal Maritime Commission, with whom *Mr. James L. Pimper*, General Counsel, Federal Maritime Commission, was on the brief, for respondent Federal Maritime Commission. *Messrs.*

Robert E. Mitchell, Deputy General Counsel, Federal Maritime Commission, and *Thomas D. Wilcox*, Attorney, Federal Maritime Commission, also entered appearances for respondent Federal Maritime Commission.

Mr. Joel E. Hoffman, Attorney, Department of Justice, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. Irwin A. Seibel*, Attorney, Department of Justice, was on the brief, for respondent United States.

Mr. Edward S. Bagley, of the bar of the Supreme Court of Louisiana, *pro hac vice*, by special leave of court, for intervenors Gulf/Mediterranean Ports Conference, et al. *Mr. Joseph M. Rault* was on the brief for intervenors Gulf/Mediterranean Ports Conference, et al.

Mr. Elkan Turk, Jr., with whom *Mr. Elkan Turk* was on the brief, for intervenors The Common Carriers by Water, Members of the Far East Conference.

Before WILBUR K. MILLER, DANAHER and WRIGHT, *Circuit Judges*.

PER CURIAM: The Federal Maritime Board[1] denied reparations sought by the petitioners because of the imposition of dual rates said to have been unlawful. It held that, since it had not disapproved the rates, it had in effect approved them; and that, in any event, the so-called Moratorium Act[2] protected the carriers from liability which accrued before its passage.

The discriminatory rates here involved were not ap-

[1] The agency has gone through a succession of names. Since 1961 it has been called the Federal Maritime Commission.

[2] The Moratorium Act, 72 Stat. 574, amended Section 14 of the Shipping Act of 1916, 39 Stat. 733, 46 U.S.C. § 812.

proved by the regulatory agency merely because it was silent concerning them, and the rates were therefore illegal. We think, too, that the Moratorium Act is prospective only and so does not relieve an offender from liability for reparations arising from a violation which occurred prior to its enactment.

Reversed and remanded to the Commission for assessment of reparations.

DANAHER, *Circuit Judge*, dissenting: The Supreme Court on May 19, 1958 decided *Federal Maritime Board v. Isbrandtsen Co., Inc.*, holding that a dual rate system which is "designed to destroy the competition of independent carriers" or "to stifle outside competition" or which otherwise employs predatory devices constitutes a "resort to other discriminating or unfair methods" in violation of section 14 of the Shipping Act of 1916.[1] As of the date of the Court's opinion, there were in existence many dozens of "conferences" subject to the jurisdiction of the Board.

Congress moved promptly because of the "grave doubts cast by the Supreme Court decision upon the legality of the dual rate system and the possible detrimental results to both American shipping and American foreign commerce."[2] The Senate feared for the "legality of the thousands of exclusive patronage dual rate contracts then used by more than half the 113 inbound and outbound steamship conferences serving U.S. ports. For many years, these dual rate conferences and the shippers they served had been parties to such contracts, with the tacit or express approval of the Federal Maritime Board."[3]

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[1] 46 U.S.C. § 801 *et seq.*

[2] H.R. Rep. No. 498, 87th Cong., 1st Sess. 3 (1961).

[3] S. Rep. No. 473, 87th Cong., 1st Sess. 2 (1961).

Congress therefore amended section 14 of the Shipping Act of 1916 "to provide that nothing in that act made unlawful any dual rate contract arrangement in effect at the time of the Supreme Court's decision (May 19, 1958), *unless and until disapproved, canceled, or modified by the Federal Maritime Board, in accordance with the standards in section 15 of the act.*"[4] (Emphasis added.)

Congress was not concerned with "rates." It deemed, however, of vital interest—at least until Congress had an adequate opportunity to review the problem—the threat to "any" dual rates. Clearly Congress considered that not all dual rate systems came within the purview of the Supreme Court's decision.

While the legislation was pending the Department of Justice reemphasized its historic position that "the system is inconsistent with the basic tenets of antitrust philosophy,"[5] but the Department's letter also emphasized[6] that the legislation

> "would validate any existing dual-rate arrangement, whether or not it had been approved by the Board, unless and until the Board disapproves, cancels, or modifies such arrangement. There are a number of conferences which now employ a dual-rate system that has not been expressly approved by the Board. The bill would permit these conferences to continue to use their unapproved systems, even though they have been on notice for more than four years that such unapproved systems are illegal, and even though such systems would have been illegal even if the Supreme Court decision had

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[4] *Ibid.*

[5] Letter of the Deputy Attorney General dated June 11, 1958 directed to Chairman Bonner of the House Committee on Merchant Marine and Fisheries.

[6] And for the reasons stated, our opinion in Isbrandtsen Co. v. United States has no bearing here. See 93 U.S. App. D.C. 293, 211 F. 2d 51, *cert. denied*, 347 U.S. 990 (1954).

gone the other way. However, in view of our having been advised that it is administratively not feasible for the Board to act on all of the as yet unapproved dual-rate arrangements in the next 2 years, the Department interposes no objection to this provision of the bill."

Thus fully advised in the premises and after extensive House hearings, Congress adopted Public Law 85-626[7] which amended section 14 of the Shipping Act of 1916 by inserting the following:

> "Provided, That nothing in this section or elsewhere in this Act, shall be construed or applied to forbid or make unlawful any dual-rate contract arrangement in use by the members of a conference on May 19, 1958, which conference is organized under an agreement approved under section 15 of this Act by the regulatory body administering this Act, *unless and until such regulatory body disapproves, cancels, or modifies such arrangement in accordance with the standards set forth in section 15 of this Act.* The term 'dual rate contract arrangement' as used herein means a practice whereby a conference establishes tariffs of rates at two levels the lower of which will be charged to merchants who agree to ship their cargoes on vessels of members of the conference only and the higher of which shall be charged to merchants who do not so agree." (Emphasis added.)

So read the law when the Board decided this case on August 4, 1961. Congress had amended the very Act from which the Board derived whatever authority it may have. Congress had spoken in behalf of a public policy of nearly a half century. As I read it, both the language of the statute and the congressional purpose are clear. It seems

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[7] 72 Stat. 574, as amended by 74 Stat. 253 extending the expiration date to June 30, 1961 and as further amended by 75 Stat. 195 extending the expiration date to September 15, 1961.

to me that on this record the Board could have done nothing but what it did do.[8]

Accordingly, I dissent.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1962

No. 16,658

H. KEMPNER, GALVESTON COTTON COMPANY AND TEXAS COTTON INDUSTRIES,
Petitioners,

v.

FEDERAL MARITIME COMMISSION, AND UNITED STATES OF AMERICA,
Respondents.

Before: Bazelon, Chief Judge, Edgerton, Wilbur K. Miller, Fahy, Washington, Danaher, Bastian,

[8] As a matter of additional emphasis, it should be noted that the 1958 amendment, as amended respecting expiration, was drafted to apply only to an arrangement, like that before us, in actual use by the members of a conference "on May 19, 1958," the date of the Court's Isbrandtsen decision, *supra*.

Congress, during the moratorium it had thus created, conducted extensive hearings, running through thousands of pages, as to which see H.R. Rep. No. 498, 87th Cong., 1st Sess. (1961); S. Rep. No. 860, 87th Cong., 1st Sess. (1961); H.R. Rep. No. 1247, 87th Cong., 1st Sess. (1961) [reproduced in 107 Cong. Rec. 19289-19291 (1961)]; and see, generally, Index to the Legislative History of the Steamship Conference/Dual Rate Law, S. Doc. No. 100, 87th Cong., 2d Sess. (1962). Thereupon, Congress enacted Public Law 87-346 (75 Stat. 762), approved October 3, 1961.

See section 15 as there amended in terms of congressional acceptance of the administrative interpretation, so long established, with specific requirements as to disapproval only after notice and hearing, and on the grounds specified. All "other agreements" coming within the purview of section 15 were to be approved.

It seems to me that congressional policy in this field beyond peradventure has been restated and reinforced. 46 U.S.C. § 814, e.g., additionally provides, as pertinent, that henceforth every permitted section 15 "agreement," like every section 813a "contract," the use of which may be permitted "by order" after the notice and hearing specified in section 813a, shall be entitled to the protection of the "exceptions" provided in sections 1-11 and 15 of Title 15.

Burger and Wright, Circuit Judges, in Chambers.

ORDER

On consideration of the petition of intervenors, Gulf Mediterranean Ports Conference, et al., for rehearing en banc, it is

ORDERED by the court that the petition is hereby denied.

PER CURIAM.

Dated: FEB 15 1963

Circuit Judge Danaher would grant the petition.

APPENDIX "C"

Shipping Act, 1916

Section 14:

No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—.

First. Pay or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow a deferred rebate to any shipper. The term "deferred rebate" in this chapter means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this chapter means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair

methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense. (46 U.S. C.A. 812.)

"Moratorium Act":

(Amendment to Section 14 of August 12, 1958, Publ. L. 85-626, 85th Congress, 72 Stat. 574):

Provided, That nothing in this section or elsewhere in this Act, shall be construed or applied to forbid or make unlawful any dual rate contract agreement in use by the members of a conference on May 19, 1958, which conference is organized under an agreement approved under Section 15 of this Act by the regulatory body administering this Act, unless and until such regulatory body disapproves, cancels, or modifies such arrangement in accordance with the standards set forth in section 15 of this Act. The term "dual rate contract arrangement" as used herein means a practice whereby a conference establishes tariffs of rates at two levels the lower of which will be charged to merchants who agree to ship their

cargoes on vessels of members of the conference only and the higher of which shall be charged to merchants who do not so agree.

Sec. 2. This Act shall be effective immediately upon enactment and shall cease to be effective on and after June 30, 1960. (Approved August 12, 1958; extended to June 30, 1961 by Publ. L. 86-542, 74 Stat. 253; extended to September 15, 1961 by Publ. L. 87-75, 75 Stat. 195; Extended to October 15, 1961 by Publ. L. 87-252, 75 Stat. 521.)

Section 15 (before its amendment on October 3, 1961 by Publ. L. 87-346, 87th Congress, 75 Stat. 762):

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Board may by order disapprove, cancel, or modi-

fy any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.

All agreements, modifications, or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part; directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action. (46 U.S.C.A. 814.)

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Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted]/162

FAR EAST CONFERENCE, AMERICAN PRESIDENT LINES, LTD., ISTHMIAN LINES, INC., et al.,

Petitioners,

—against—

UNITED STATES OF AMERICA, FEDERAL MARITIME COMMISSION, H. KEMPNER, GALVESTON COTTON COMPANY and TEXAS COTTON INDUSTRIES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HERMAN GOLDMAN,
ELKAN TURK,
ELKAN TURK, JR.,
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Supreme Court of the United States

OCTOBER TERM, 1962

No.

FAR EAST CONFERENCE, AMERICAN PRESIDENT LINES, LTD., ISTHMIAN LINES, INC., et al.,

Petitioners,

—against—

UNITED STATES OF AMERICA, FEDERAL MARITIME COMMISSION, H. KEMPNER, GALVESTON COTTON COMPANY and TEXAS COTTON INDUSTRIES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners herein respectfully pray for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit to review a decision and order of that Court. The petitioners are the Far East Conference and all of its members. Those members are as follows: American President Lines, Ltd.; Daido Kaiun Kaisha, Ltd.; Skibsaktieselskabet Varild; Aksjeselskapet Marina; Aktieselskabet Glittre; Dampskibsinteressentskabet Garonne; Aktieselskabet Standard; Fearnley & Egers Befragtningsforretning A/S; Skibsaktieselskapet Sangstad; Skibsaktieselskapet Soldstad; Skibsaktieselskapet

Siljestad; Dampskibsaktieselskabet International; Skibsaktieselskapet Mandeville; Skibsaktieselskapet Goodwill; Universal Trading & Shipping Agency Aksjeselskap; Iino Kaiun Kaisha, Ltd; Isthmian Lines, Inc.; Kawasaki Kisen Kaisha, Ltd.; Lykes Bros. S.S. Co., Inc.; Mitsubishi Kaiun Kaisha, Ltd.; Mitsui Steamship Co., Ltd.; Dampskibsselskabet af 1912 Aktieselskab; Aktieselskabet Dampskibsselskabet Svendborg; Nippon Yusen Kaisha; Osaka Shosen Kaisha, Ltd.; Shinnihon Steamship Co., Ltd.; States Marine Lines, Inc.; Global Bulk Transport Incorporated; United States Lines Company; Waterman Steamship Corporation; United Philippine Lines, Inc.; Wilhelmsens Dampskibsaktieselskab; A/S Den Norske Afrika-og Australielinie; A/S Tonsberg; A/S Tankfart I; A/S Tankfart IV; A/S Tankfart V; A/S Tankfart VI; Yamashita Kisen Kaisha, Ltd; Maritime Company of the Philippines, Inc.

For brevity the Conference and all of the above members are hereinafter collectively referred to as the "Far East Conference."[1]

[1] For convenience of all of the parties, three cases instituted before the Federal Maritime Board against the Petitioners by H. Kempner, Galveston Cotton Company and Texas Cotton Industries, were consolidated, for hearing purposes only, with a case instituted by H. Kempner against the Gulf/Mediterranean Ports Conference and a case instituted against the Far East Conference and its members by Isbrandtsen Company, Inc. In the latter two cases petitions for writs of certiorari have been filed in this Court and assigned, respectively, numbers 1002 and 1082. The consolidation for hearing by the Board was agreed to because a number of the same witnesses would be called in all five cases. In other respects, the cases against the Petitioners differs significantly from any of the other cases.

Opinion Below

The opinion and order of the court below has not yet been officially reported. It is, however, reported at 313 F. 2d 586, and printed as Appendix A to this petition.

Jurisdiction

The jurisdiction of this Court is invoked under §10 of the Review Act of 1950, 64 Stat. 1132 (5 U.S.C. §1040), and under 28 U.S.C. §1254(1). This petition is timely, the order of the court below having been entered January 10, 1963, and an order denying the petition of the petitioners herein for a rehearing having been entered on February 26, 1963.

The Questions Presented

1. Whether, when the Federal Maritime Commission[2] has found that it has approved, under §15 of the Shipping Act, an agreement among a group of common carriers and that finding is supported by substantial and uncontradicted evidence that the Commission has, over a period of years, taken numerous formal actions approbative of the agreement and has entered no order disapproving such agreement, the

[2] Pursuant to Reorganization Plan No. 7 of 1961 (H. Doc. 187, 87th Cong., 1st Sess.; note following § 1111 of Title 46, U.S.C.A.), in accordance with the Reorganization Act of 1949, 63 Stat. 203, as amended (5 U.S.C. §§ 133z to 133z-15), the Federal Maritime Board, which made the Order under review, was abolished on August 11th, 1961, and all of its functions under the Shipping Act, 1916, 39 Stat. 728, as amended (46 U.S.C. §§ 801, *et seq.*), so far as here material, were transferred to the Federal Maritime Commission which was created by the Reorganization Plan. The Federal Maritime Commission and its predecessors are hereinafter sometimes referred to as the "Commission."

Court of Appeals can properly hold that such agreement has not been approved for want of compliance with procedural formality which no court has defined and which is not prescribed in the statute.

2. Whether after the amendments to the Shipping Act between August 12, 1958, and October 3, 1961, the Court of Appeals may, as to pre-May 19, 1958, transactions, properly construe or apply any section of the Shipping Act so as to forbid or make unlawful a dual rate contract arrangement which was in use on May 19, 1958, by a conference which was organized under an agreement approved under §15 of the Shipping Act, when the Commission had not at any time disapproved, cancelled or modified such dual rate arrangement.

3. Whether a shipper against whom a common carrier by water has unjustly discriminated can recover reparation by mere proof that it paid freight at a higher rate than competitors for transportation of the same commodity without proof of injury in the marketing of that commodity and the amount of the injury.

Statutory Provisions Involved

The statutory provisions involved are: §10 of the Review Act of 1950, 64 Stat. 1132 (5 U.S.C. §1040); 28 U.S.C. §1254(1); §§15, 16, 17, and 22 of the Shipping Act, 1916, 39 Stat. 733-734, 736, as amended prior to October 3rd, 1961 (46 U.S.C. §§814-816, 821 (1952)); Pub. L. 85-626, 72 Stat. 574 (August 12th, 1958); Pub. L. 86-542, 74 Stat. 253 (June 29th, 1960); Pub. L. 87-75, 75 Stat. 195 (June 30th, 1961); Pub. L. 87-252, 75 Stat. 521 (September 16th, 1961); and

Pub. L. 87-346, 75 Stat. 762 (October 3rd, 1961). These lengthy statutory provisions are printed in Appendix B.

Statement of the Case

The Far East Conference is a group of common carriers by water who, pursuant to a conference agreement duly approved on November 14, 1922, under §15 of the Shipping Act, 1916, 39 Stat. 733 (46 U.S.C. §814), establish tariffs of rates for the transportation by its members of property from United States Atlantic and Gulf Ports to the Far East (J. A. 325). The conference agreement contains no express provision for the adoption of a contract system (J. A. 35, 36). Until about 1929, the Conference had been able to maintain a stable rate structure. In 1929, rates became very unstable and the Conference members established a contract system which has been in use ever since (J. A. 405). This system has undergone changes as required by the times, *e.g.*, changes in the differential between contract and non-contract rates and the inclusion within the system of a widening range of commodities (J. A. 406-9).

All of the minutes and tariffs of the Conference reflecting the adoption of and changes in the contract system, including the extension of the system to cotton, were filed with the Commission. The Commission itself found that these minutes were filed, reviewed by its staff and no exception taken (J. A. 474). However, the Commission's approval was not, as intimated in the opinion below, limited to silent acceptance of these filings.

At varying times between July, 1934 and March, 1936 the Commission approved, under §15 of the Shipping Act, eighteen separate agreements between the Far East Conference and eighteen intercoastal carriers which transported cargo from Atlantic or Gulf ports to Pacific Coast ports for on-carriage to the Far East by Trans-Pacific lines. Each of these eighteen agreements contained the following clause:[3]

> "The Conference carriers agree that they will give the intercoastal carrier *the privilege of participating in the carriage of cargo of shippers having contracts with the Conference carriers*, at rates and under conditions provided in said *contracts*." (Emphasis supplied.)

The formal approval of these agreements, necessarily encompassed approval of the Far East Conference contract system.

In 1934, the Commission, disturbed by the continuing rate instability in a number of trades including the Far East trade, instituted a proceeding entitled *Section 19 Investigation, 1935*, 1 U.S.S.B.B. 470 (1935). The report of that proceeding (1 U.S.S.B.B. at 479-480), describes and favorably discusses the Far East Conference contract system.

In January, 1950, the Commission intervened in the antitrust suit instituted by the Department of Justice against the Far East Conference based upon its use of an allegedly unapproved contract system. In

[3] An illustrative contract is set forth in Appendix C to this Petition, and a schedule of the seventeen additional contracts is set forth in Appendix D hereto. These appendices are, respectively, Appendix C and Appendix D attached to the Joint Appendix and certified by the Clerk of the Court of Appeals.

this Court (*Far East Conference* v. *United States*, 342 U.S. 570 (1952)), the Commission filed a brief which assured this Court (pp. 13, 35, and 36) that it had fully approved the Far East Conference contract system citing *Section 19 Investigation, 1935, supra*, as one of the evidences of approval.

Finally, in *American Hawaiian Steamship Co. et al.* v. *Intercontinental Marine Lines, Inc.*, 4 F.M.B. 160, 165 (1953), the Commission ruled that the failure of the Far East Conference to admit Intercontinental to Conference membership "*including participation in shipper's contracts* entered into pursuant to [the Conference] Agreement No. 17 will result in said agreement and contracts being unjustly discriminatory and unfair as between respondent and complainants * * *." (Emphasis supplied)

Thus, not only by silence, but also by at least 22 separate, affirmative acts, documents and formal orders, the Commission has specifically referred to the Far East Conference contract system and taken action with respect thereto as a duly effective and duly approved agreement.

Until February 7, 1950, the Far East Conference contract system had never been applied to baled cotton (J.A. 469). During the decade preceding World War II, the shippers of baled cotton had suffered from such violently fluctuating and unstable ocean rates, that the future dealing in cotton became a hazardous gamble on ocean freight rates rather than the marketing of a staple commodity (J.A. 410). The large shippers invariably benefited because they could charter vessels at low rates and could bargain more effectively with regular common carriers (J.A.

104, 105). The result was that in January, 1950, after international trade was released from wartime restrictions, the American Cotton Shippers Association requested the Far East Conference to extend their contract system to baled cotton (J.A. 473, 474). The Far East Conference acceded to this request after discussion with Commission personnel (J.A. 411). New tariff pages reflecting this extension were filed in accordance with the specific recommendations of the Commission staff (J.A. 411).

The Respondent, H. Kempner, is a Massachusetts trust. The Respondent, Galveston Cotton Company, is a wholly-owned subsidiary of H. Kempner, and Texas Cotton Industries is a corporation in which H. Kempner has a substantial interest. All are engaged in the business of buying and exporting cotton and are under the management of Mr. Harris Kempner (J.A. 471). For brevity, these three entities will be collectively referred to as "Kempner".

Kempner became a contract shipper, but when he was detected in contract violation he terminated his agreement (J.A. 198, 199, 470).

By complaints to the Commission, Kempner charged that the Far East Conference contract system was illegal, *inter alia*, for want of approval under §15 of the Act, and sought reparation in the amount of the difference between freight he had paid at the non-contract rates and such freight computed at the lower contract rates. At the hearings Kempner offered no evidence of damages due to discrimination against him.

The Commission, on an extensive record, dismissed the complaints on the grounds, among others, that

the Far East Conference contract system had been duly approved and that Kempner had not proved damages due to discrimination. Kempner petitioned the court below for review of the Commission report and order. That court, in a *per curiam* decision, held that the discriminatory rates had not been approved, because the court found that the Commission had not taken undefined procedure but was only silent with respect to these rates, and they were therefore illegal. As to the amendatory legislation adopted in August, 1958, to legalize existing contract systems pending congressional investigation of those systems, the decision merely stated, without explanation, that this legislation was prospective only and did not relieve a carrier from liability for reparation arising out of the charge of non-contract rates prior to August, 1958. The case was ordered remanded to the Commission for assessment of reparation.

Judge Danaher dissented on the ground that the amendatory legislation was retroactive and deprived Kempner of any rights which he might have had if the Far East Conference contract system had not been duly approved (Appendix A, pp. A-3—A-7).

Reasons for Granting the Writ

I. It Is of Paramount Public Importance That the Procedural Requisites for Approval Under §15 of the Shipping Act of Agreements Among Common Carriers by Water and Other Persons Subject to the Act Be Judicially Defined.

The Shipping Act was enacted in 1916, following an extensive House Committee investigation of rate-fixing agreements among common carriers by water.

The committee concluded that the public interest would best be served if such agreements were exempted from the operations of the antitrust laws and subjected to a requirement that they be filed with a regulatory agency which should approve them unless they should violate prescribed criteria.[4] The recommendations of the committee were followed and the provisions for filing and approval became §15 of the Shipping Act—the very heart of the regulation of water transportation.

From 1916 to 1954, the administrative practice relied upon by the shipping industry was that rate making conferences, acting under approved agreements, had authority within the purview of that approval lawfully to establish contract rate systems. In 1954, the Court of Appeals for the District of Columbia Circuit in *Isbrandtsen Co. v. United States*, 93 App. D.C. 293, 211 F. 2d 51, cert. denied *sub nom. Japan Atlantic & Gulf Freight Conference v. United States*, 347 U.S. 990 (1954), decided that the determination of a conference to institute a contract system was a new agreement and, therefore, required §15 approval. The court did not, however, specify what Commission action would constitute approval.

The court indicated that parties to an approved rate making agreement would require further approval for any concerted action which was not an "interstitial adjustment" in their rate making activities. This vague standard for differentiating between actions which are and actions which are not within the

[4] H. Doc. No. 805, 63rd Cong., 2d Sess. (1914) pp. 415-421. Because H. Doc. No. 805 is difficult to obtain, excerpts therefrom were printed as a joint appendix to the Government brief in *Federal Maritime Board v. Isbrandtsen*, Nos. 73 and 74, Oct. Term 1957 (356 U.S. 481).

purview of the original approval of a rate making agreement has already resulted in numerous proceedings in which various conference actions which had long been assumed to be within the purview of the approval of the basic conference agreement, have been challenged as new agreements. The wide-ranging scope of this reexamination is only suggested by the following illustrations:

a) A change of interpretation of a clause in a shipper's contract. *Anglo-Canadian Shipping Co.* v. *United States*, 264 F. 2d (9th Cir. 1959).

b) Actions taken under an approved joint agreement between conferences. Commission Docket No. 872 (still pending).

c) Absorption of rail rates. Commission Docket No. 1102 (still pending).

d) Limitation on brokerage payments. *American Union Transport* v. *United States*, 103 App. D.C. 229, 257 F.2d 607, cert. denied, 358 U.S. 828 (1958).

The foregoing does not purport to be a complete catalogue of the action among carriers and among other persons subject to the Shipping Act which have been, or may in the future be, for the first time questioned as to the need for separate §15 approval. For example, there are through-freighting agreements, joint service agreements, freight forwarder agreements and agreements among terminal operators. What is decided in this case with regard to the requisites of adequate approval will affect all such cases.[5]

[5] Although, in 1961, the Congress substantially amended the second paragraph of §15 by adding a new criterion for disapproval, it continued the omission of any specified procedure for approval.

The law would appear to have created a trap for the unwary if activities, conducted for many years with the full knowledge and approval (as that term is understood by the man in the street) of the regulatory agency and without any intimation of illegality, should suddenly, by administrative or judicial decision, be held to be §15 agreements and illegal for want of approval by a procedure neither described in the statute nor delineated by the courts. The price of such unwitting violation may be up to $1,000 for each day that it has continued. Section 15 of the Shipping Act, 1916, 39 Stat. 733, as amended (46 U.S.C. §814).

Whether the ultimate conclusion be harsh or lenient, we submit that the question of the requisites for approval under §15 as amended in 1961 should be settled by this Court.

We submit that the question of the prerequisites for §15 approval is not only important but also that the court below erroneously decided that the prerequisites had not been met in the instant case. The Commission in its report (J.A. 484) specifically found that it had approved the Far East Conference contract system. The administrative record before the Court of Appeals contained, as we have shown, twenty-two separate, affirmative actions of the Commission with respect to the Far East Conference contract system, which clearly evidenced Commission favor. There was no evidence to the contrary. When an administrative agency makes a finding of fact which is supported by substantial and uncontradicted evidence, a court oversteps its authority when it disregards that finding and reverses the conclusion based thereon (§10(e)(B)(5) of the Administrative Procedure Act, 60 Stat.

243 (5 U.S.C. §1009(e)(B)(5)). We submit that the court below also disregarded the principles of review under which an agency's interpretation of its own action will be given great weight.

II. Pub. L. 85-626 and the Acts Extending and Supplanting It Preclude a Holding That a Contract System in Use on May 19, 1958, Was Illegal for Want of §15 Approval.

Federal Maritime Board v. *Isbrandtsen Company, Inc.*, 356 U.S. 481 (1958), created serious doubt whether any of the sixty contract systems then in use could pass the tests for legality announced in that case. In order to prevent the chaos which would ensue from the elimination of all such systems pending a thorough investigation,[6] the Congress enacted Pub. L. 85-626, 72 Stat. 574 (Appendix B, p. 5), which provided, so far as here material:

> "* * * That nothing in this section or elsewhere in this Act shall be construed or applied to forbid or make unlawful any dual rate contract arrangement *in use* by the members of a conference on May 19, 1958, which conference is organized under an agreement approved under section 15 of this Act * * *." (Emphasis supplied)

The choice of the words "in use" was deliberate. The object clearly was to protect all systems which had been put into operation before *Federal Maritime Board* v. *Isbrandtsen* from judicially declared stand-

[6] H.R. Rep. No. 2055, 85th Cong., 2d Sess. (1958), Sen. Rep. No. 1709, 85th Cong., 2d Sess. (1958), and H.R. Rep. No. 498, 87th Cong., 1st Sess. 3 (1961).

ards of illegality until the Congress could decide what, if any, contract systems should be authorized. However, Pub. L. 85-626 did not protect systems which might be initiated after the judicial standards had been declared. Hence the thrust of that Act was retrospective and not at all prospective. Pub. L. 85-626, which was to expire on June 30th, 1960, was extended to October 15th, 1961.[7] Effective October 3rd, 1961, the Congress enacted the permanent law affecting contract systems—Pub. L. 87-346, 75 Stat. 762 (Appendix B, pp. 9-20).

By §1 of this Act, the Congress added to the Shipping Act §14b, 75 Stat. 762 (46 U.S.C. §813a) prescribing the manner in which the Commission could *permit* new contract systems to be adopted. Conferences which were using contract rate systems on May 19th, 1958 which had been continued effective by the interim statutes, received separate treatment under §3 of the permanent legislation (Appendix B, p. 15):[8]

> "* * * all existing [contract rate] agreements which are lawful under the Shipping Act, 1916, immediately prior to the enactment of this Act, shall *remain* lawful unless disapproved, cancelled or modified by the Commission pursuant to the provisions of the Shipping Act, 1916 as amended by this Act. * * *" (Emphasis supplied).

The permanent legislation (Pub. L. 87-346) contained provisions which would render some of these old contract systems illegal unless amended to conform to

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[7] Pub. L. 86-542, 74 Stat. 253; Pub. L. 87-75, 75 Stat. 195; and Pub. L. 87-252, 75 Stat. 521 (Appendix B, pp. 6-8).

[8] Section 3, 75 Stat. 764, has not been codified but is set forth in the note following 46 U.S.C.A. §813a.

the new statute. As to them, §3 contained a proviso giving the conferences having such old systems a limited time within which to conform them to the new requirements.

While the first interim bill was before the House Committee on Merchant Marine and Fisheries, the Department of Justice wrote a letter to Chairman Bonner of the House Committee (H. R. Rep. No. 2055, 85th Cong., 2d Sess. (1958) 5) which stated:

> "We further note that H.R. 12751 goes beyond merely restoring the situation as it existed prior to the Supreme Court decision. In an earlier stage of this litigation, the Court of Appeals for the District of Columbia Circuit held in January 1954 that section 15 of the Shipping Act, 1916, 'makes it illegal to institute the dual-rate system' without prior approval of that system by the Federal Maritime Board (*Isbrandtsen Co. v. United States*, 211 F. 2d 51, certiorari denied, 347 U.S. 990. H.R. 12751, however, would validate any existing dual-rate arrangement, whether or not it had been approved by the Board, unless and until the Board disapproves, cancels, or modifies such arrangement."

With this advice from the counsel to our Government, the House Committee reported out, and the House adopted, the bill which became the first interim legislation. Chairman Celler of the House Judiciary Committee, who opposed this legislation, spoke to like effect (104 Cong. Rec. 15,643 (1958)). Three qualified commentators have expressed the same view.[9]

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[9] Staff of Subcommittee No. 5, House Judiciary Committee, Report on the Ocean Freight Industry, H. R. Rep. No. 1419, 87th Cong., 2d Sess. 215 n.23 (1962); Walden, The Dual-Rate Morato-

As relates to existing contract systems, the statute obviously substituted the concept of legality pending disapproval for the concept in the Shipping Act, as originally written, of illegality pending approval. That concept was carried through the interim bills and was incorporated in §3 of the final legislation.

The Department of Justice argued below that 61 Stat. 633 (1 U.S.C. §109) precludes interpretation of the interim and final legislation as destroying causes of action which arose prior to May 19th, 1958.

Secondly, §109 has always been applied to legislation which alters the text of an existing statute or repeals it in whole or in part. By way of contrast, Pub. L. 85-626, as extended, made no change whatsoever in the existing language of the Shipping Act.[10]

Two answers to this contention appear conclusive. First, §109 makes an exception of cases where the statute expressly provides for the release of existing liabilities. The congressional mandate that nothing in the Shipping Act should be construed or applied to forbid or make unlawful any dual rate arrangement *in use* by a conference on May 19th, 1958, clearly applies whether the transaction giving rise to a claim of illegality occurred before or after May 19th, 1958. Had the purpose of Congress been to effect prospective legalization, the statute would

rium—End of the Isbrandtsen Odyssey, 10 J. Pub. L. 78, 79 (1961); Auerbach, The Isbrandtsen Case and its Aftermath, 11, 1959 Wis. L. Rev. 369, 389. Professor Auerbach was of counsel for the conference involved in *Federal Maritime Board* v. *Isbrandtsen*, 356 U.S. 481 (1958). However, his retainer by that conference terminated upon the submission of that case.

[10] Prior to the August 12th, 1958 legislation, the Shipping Act did not mention contract systems.

simply have stated that contract systems in use on May 19th, 1958, shall be lawful until June 30th, 1960.

In view of the literal meaning of the language of these Acts and their legislative history, they should be construed liberally, and not so as to distort the statutory language. *Haggar* v. *Helvering*, 208 U.S. 389, 394 (1940) and cases cited; *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 128-129 (1944).

III. In Reversing the Commission's Denial of Reparation, the Decision Below Conflicts with Decisions of This Court.

In reversing, the court below remanded these cases to the Commission for the assessment of reparations. This ruling was not alone erroneous, but was also in direct conflict with the decisions of this Court.

Kempner offered no evidence of damages due to discrimination. Mr. Welch, Kempner's trial counsel, disclaimed any proof of damages. The following between the trial examiner and Kempner's counsel tells the story (J. A. 98):

> Examiner Basham: "You say you are not claiming any damages for sales you lost."
>
> Mr. Welch: "Not any monetary damages."
>
> Examiner Basham: "Your damage was represented only by the difference in the contract and non-contract rates?"
>
> Mr. Welch: "The damage for which we are asking compensation is limited to that."

Indeed, Harris Kempner, the manager of the Kempner group, testified that in trades where, by using non-conference tonnage, he had a freight advantage over his competitors, he gained no business thereby (J. A. 134). On the basis of the above, the Court of Appeals should have dismissed these cases even if it had decided all of the other issues in Kempner's favor.

The decision below is in direct conflict with *I.C.C.* v. *United States*, 289 U.S. 385 (1933), and *Penn. R. Co.* v. *International Coal Co.*, 230 U.S. 184 (1913).

In *I.C.C.* v. *United States, supra*, this Court stated, with respect to a shipper seeking reparation for unjust discrimination under the Interstate Commerce Act (289 U.S. at 390-391):

> "He is to recover the damages that he has suffered, which may be more than the preference or less (*Penn. R. Co.* v. *International Coal Co., supra*, pp. 206, 207), but which, whether more or less, is something to be proved and not presumed. *Ibid.*, p. 204. 'Recovery cannot be had unless it is shown that, as a result of defendant's acts, damages in some amount susceptible of expression in figures resulted.' *Keogh* v. *C. & N.W. Ry. Co., supra*, p. 165. The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less.
>
> "The answer to that question is not independent of time and place and circumstance. It calls for something more than the use of a mathematical formula. If by a reason of the discrimination,

> the preferred producers have been able to divert business that would otherwise have gone to the disfavored shipper, damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the shipper to sell at a lowered market price [citing cases], damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more."

Any holding that, under the proof of this case, the Commission could assess any reparation is squarely in conflict with the above decisions of this Court.

At all times here in question there was no remedy for overcharge under the Shipping Act, 1916, as amended. Cases which arose under the Interstate Commerce Act have no application here since the Interstate Commerce Commission, at the time those cases were decided, did have the authority to award damages for overcharge, *i.e.*, the difference between the rate charged and the tariff rate or the rate held to be a reasonable rate.

Experience under the Interstate Commerce Act teaches that, notwithstanding the recent grant to the Commission of the power to award reparation for overcharges,[11] proceedings for reparation for discrimination will still be brought in substantial numbers. It is of the maximum importance that this Court determine whether the rule laid down in the decisions of this Court above cited are fully applicable to proceedings for reparation for *discrimination* under both the Shipping Act and the Interstate Commerce Act.

[11] Section 18(b)(3), added to the Shipping Act in 1961 by §4 of Pub. L. 87-346 (Appendix B, pp. 17-18

CONCLUSION

For the foregoing reasons, we respectfully urge that the petition for a writ of certiorari herein sought should be granted.

Respectfully submitted,

New York, N.Y.
May 27, 1963

HERMAN GOLDMAN,
ELKAN TURK,
ELKAN TURK, JR.,
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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,658

H. KEMPNER, GALVESTON COTTON COMPANY AND TEXAS COTTON INDUSTRIES, PETITIONERS

v.

FEDERAL MARITIME COMMISSION (formerly FEDERAL MARITIME BOARD) and UNITED STATES OF AMERICA, RESPONDENTS

GULF MEDITERRANEAN PORTS CONFERENCE, ET AL., The Common Carriers by Water, Members of THE FAR EAST CONFERENCE, INTERVENORS

Petition for Review of an Order of the Federal Maritime Commission

Decided January 10, 1963

Mr. Shelby Fitze, with whom *Messrs. Delmar W. Holloman* and *James T. Welch* were on the brief, for petitioners.

Mr. Paul D. Page, Jr., Attorney, Federal Maritime Commission, with whom *Mr. James L. Pimper*, Gen-

eral Counsel, Federal Maritime Commission, was on the brief, for respondent Federal Maritime Commission. *Messrs. Robert E. Mitchell*, Deputy General Counsel, Federal Maritime Commission, and *Thomas D. Wilcox*, Attorney, Federal Maritime Commission, also entered appearances for respondent Federal Maritime Commission.

Mr. Joel E. Hoffman, Attorney, Department of Justice, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. Irwin A. Seibel*, Attorney, Department of Justice, was on the brief, for respondent United States.

Mr. Edward S. Bagley, of the bar of the Supreme Court of Louisiana, *pro hac vice*, by special leave of court, for intervenors Gulf Mediterranean Ports Conference, et al. *Mr. Joseph M. Rault* was on the brief for intervenors Gulf Mediterranean Ports Conference, et al.

Mr. Elkan Turk, Jr., with whom *Mr. Elkan Turk* was on the brief, for intervenors The Common Carriers by Water, Members of the Far East Conference.

Before WILBUR K. MILLER, DANAHER and WRIGHT, *Circuit Judges*.

PER CURIAM: The Federal Maritime Board[1] denied reparations sought by the petitioners because of the

[1] The agency has gone through a succession of names. Since 1961 it has been called the Federal Maritime Commission.

imposition of dual rates said to have been unlawful. It held that, since it had not disapproved the rates, it had in effect approved them; and that, in any event, the so-called Moratorium Act[2] protected the carriers from liability which accrued before its passage.

The discriminatory rates here involved were not approved by the regulatory agency merely because it was silent concerning them, and the rates were therefore illegal. We think, too, that the Moratorium Act is prospective only and so does not relieve an offender from liability for reparations arising from a violation which occurred prior to its enactment.

Reversed and remanded to the Commission for assessment of reparations.

DANAHER, *Circuit Judge*, dissenting: The Supreme Court on May 19, 1958 decided *Federal Maritime Board* v. *Isbrandtsen Co., Inc.*, holding that a dual rate system which is "designed to destroy the competition of independent carriers" or "to stifle outside competition" or which otherwise employs predatory devices constitutes a "resort to other discriminating or unfair methods" in violation of section 14 of the Shipping Act of 1916.[1] As of the date of the Court's opinion, there were in existence many dozens of "conferences" subject to the jurisdiction of the Board.

Congress moved promptly because of the "grave doubts cast by the Supreme Court decision upon the

[2] The Moratorium Act, 72 Stat. 574, amended Section 14 of the Shipping Act of 1916, 39 Stat. 733, 46 U.S.C. § 812.

[1] 46 U.S.C. § 801 *et seq.*

legality of the dual rate system and the possible detrimental results to both American shipping and American foreign commerce."[2] The Senate feared for the "legality of the thousands of exclusive patronage dual rate contracts then used by more than half the 113 inbound and outbound steamship conferences serving U.S. ports. For many years, these dual rate conferences and the shippers they served had been parties to such contracts, with the tacit or express approval of the Federal Maritime Board."[3]

Congress therefore amended section 14 of the Shipping Act of 1916 "to provide that nothing in that act made unlawful any dual rate contract arrangement in effect at the time of the Supreme Court's decision (May 19, 1958), *unless and until disapproved, canceled, or modified by the Federal Maritime Board, in accordance with the standards in section 15 of the act.*"[4] (Emphasis added.)

Congress was not concerned with "rates." It deemed, however, of vital interest—at least until Congress had an adequate opportunity to review the problem—the threat to "any" dual rates. Clearly Congress considered that not all dual rate systems came within the purview of the Supreme Court's decision.

While the legislation was pending the Department of Justice reemphasized its historic position that "the system is inconsistent with the basic tenets of anti-

[2] H.R. Rep. No. 498, 87th Cong., 1st Sess. 3 (1961).
[3] S. Rep. No. 473, 87th Cong., 1st Sess. 2 (1961).
[4] *Ibid.*

trust philosophy."[5] but the Department's letter also emphasized[6] *that the legislation*

> "would validate any existing dual-rate arrangement, whether or not it had been approved by the Board, unless and until the Board disapproves, cancels, or modifies such arrangement. There are a number of conferences which now employ a dual-rate system that has not been expressly approved by the Board. The bill would permit these conferences to continue to use their unapproved systems, even though they have been on notice for more than four years that such unapproved systems are illegal, and even though such systems would have been illegal even if the Supreme Court decision had gone the other way. However, in view of our having been advised that it is administratively not feasible for the Board to act on all of the as yet unapproved dual-rate arrangements in the next 2 years, the Department interposes no objection to this provision of the bill."

Thus fully advised in the premises and after extensive House hearings, Congress adopted Public Law

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[5] Letter of the Deputy Attorney General dated June 11, 1958 directed to Chairman Bonner of the House Committee on Merchant Marine and Fisheries.

[6] And for the reasons stated, our opinion in Isbrandtsen Co. v. United States has no bearing here. See 93 U.S.App. D.C. 293, 211 F.2d 51, *cert. denied*, 347 U.S. 990 (1954).

85-626[7] which amended section 14 of the Shipping Act of 1916 by inserting the following:

> "Provided, That nothing in this section or elsewhere in this Act, shall be construed or applied to forbid or make unlawful any dual rate contract arrangement in use by the members of a conference on May 19, 1958, which conference is organized under an agreement approved under section 15 of this Act by the regulatory body administering this Act, *unless and until such regulatory body disapproves, cancels, or modifies such arrangement in accordance with the standards set forth in section 15 of this Act.* The term 'dual rate contract arrangement' as used herein means a practice whereby a conference establishes tariffs of rates at two levels the lower of which will be charged to merchants who agree to ship their cargoes on vessels of members of the conference only and the higher of which shall be charged to merchants who do not so agree." (Emphasis added.)

So read the law when the Board decided this case on August 4, 1961. Congress had amended the very Act from which the Board derived whatever authority it may have. Congress had spoken in behalf of a public policy of nearly a half century. As I read it, both the language of the statute and the congressional purpose are clear. It seems to me that on this

[7] 72 STAT. 574, as amended by 74 STAT. 253 extending the expiration date to June 30, 1961 and as further amended by 75 STAT. 195 extending the expiration date to September 15, 1961.

record the Board could have done nothing but what it did do.[8]

Accordingly, I dissent.

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[8] As a matter of additional emphasis, it should be noted that the 1958 amendment, as amended respecting expiration, was drafted to apply only to an arrangement, like that before us, in actual use by the members of a conference "on May 19, 1958," the date of the Court's Isbrandtsen decision, *supra*.

"Congress, during the moratorium it had thus created, conducted extensive hearings, running through thousands of pages, as to which see H.R. REP. No. 498, 87th Cong., 1st Sess. (1961); S. REP. No. 860, 87th Cong., 1st Sess. (1961); H.R. REP. No. 1247, 87th Cong., 1st Sess. (1961) [reproduced in 107 Cong. Rec. 19289-19291 (1961)]; and see, generally, Index to the Legislative History of the Steamship Conference/Dual Rate Law, S. Doc. No. 100, 87th Cong., 2d Sess. (1962). Thereupon, Congress enacted Public Law 87-346 (75 STAT. 762), approved October 3, 1961.

See section 15 as there amended in terms of congressional acceptance of the administrative interpretation, so long established, with specific requirements as to disapproval only after notice and hearing, and on the grounds specified. All "other agreements" coming within the purview of section 15 were to be approved.

It seems to me that congressional policy in this field beyond peradventure has been restated and reinforced. 46 U.S.C. § 814, e.g., additionally provides, as pertinent, that henceforth every permitted section 15 "agreement" like every section 813a "contract," the use of which may be permitted "by order" after the notice and hearing specified in section 813a, shall be entitled to the protection of the "exceptions" provided in sections 1-11 and 15 of Title 15.

Appendix B

Pertinent Sections of the Shipping Act

SEC. 15. 46 U. S. C. §814 (1952). 39 Stat. 733. That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares, giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and

shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

Appendix B

SEC. 16, 46 U.S.C. §815. (1952) 39 Stat. 734. That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company, or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as

is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

Sec. 17, 46 U.S.C. §816 (1952); 39 Stat. 734. That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."

Section 22, 46 U.S.C. §821 (1952):

"Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation

of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation."

PUBLIC LAW 85-626; 72 STAT. 574

[S. 3916]

An Act to amend the Shipping Act, 1916.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, THAT:

Section 14 of the Shipping Act, 1916, is amended by inserting at the end thereof the following: "Provided, That nothing in this section or elsewhere in this Act, shall be construed or applied to forbid or make unlawful any dual rate contract arrangement in use by the members of a conference on May 19, 1958, which conference is organized under an agreement approved under section 15 of this Act by the regula-

tory body administering this Act, unless and until such regulatory body disapproves, cancels, or modifies such arrangement in accordance with the standards set forth in section 15 of this Act. The term 'dual rate contract arrangement' as used herein means a practice whereby a conference establishes tariffs of rates at two levels the lower of which will be charged to merchants who agree to ship their cargoes on vessels of members of the conference only and the higher of which shall be charged to merchants who do not so agree."

SEC. 2. This Act shall be effective immediately upon enactment and shall cease to be effective on and after June 30, 1960.

Approved August 12, 1958.

PUBLIC LAW 86-542; 74 STAT. 253

[H. R. 10840]

An Act to amend Public Law 85-626 relating to dual rate contract agreements.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, THAT:

Section 2 of the Act entitled "To amend the Shipping Act, 1916", approved August 12, 1958 (72 Stat. 574), is amended by striking out "1960" and inserting in lieu thereof "1961".

Approved June 29, 1960.

Appendix B

PUBLIC LAW 87-75; 75 STAT. 195

[S. 2154]

An Act to amend Public Law 85-626, as amended by Public Law 86-542, relating to dual rate contract agreements.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, THAT:

Section 2 of the Act entitled "To amend the Shipping Act, 1916", approved August 12, 1958 (72 Stat. 574), as amended by an Act approved June 29, 1960 (74 Stat. 253), is further amended by striking out "June 30, 1961" and inserting in lieu thereof "September 15, 1961".

Approved June 30, 1961.

Appendix B

PUBLIC LAW 87-252; 75 STAT. 521

[H. R. 3156]

An Act to make the Panama Canal Company Immune from attachment or garnishment of salaries owed to its employees, and to amend the Shipping Act, 1916.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, THAT:

Paragraph (d) of section 248 of title 2, Canal Zone Code, as added by section 2 of the Act of June 29, 1948 (62 Stat. 1078), is amended to read as follows:

"(d) May sue and be sued in its corporate name, but no attachment, garnishment, or similar process shall be issued against salaries or other moneys owed by the Company to its employees".

SEC. 2. That section 2 of the Act of August 12, 1958, as amended, is amended to read as follows:

"SEC. 2. This Act shall be effective immediately upon enactment and shall cease to be effective on and after October 15, 1961: *Provided, however*, That contracts in effect midnight September 14, 1961, shall remain in effect until midnight October 15, 1961, unless such contracts terminate earlier by their own terms or are rendered illegal under the terms of the first section of this Act."

Approved September 16, 1961.

Appendix B

PUBLIC LAW 87-346

87TH CONGRESS, H. R. 6775

OCTOBER 3, 1961

AN ACT

75 STAT. 762.

To amend the Shipping Act, 1916, as amended, to authorize ocean common carriers and conferences thereof, serving the foreign commerce of the United States to enter into effective and fair dual rate contracts with shippers and consignees, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Shipping Act, 1916, is amended by adding after section 14a a new section to read as follows:

"SEC. 14b. Notwithstanding any other provisions of this Act, on application the Federal Maritime Commission (hereinafter 'Commission') shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract, amendment, or modification thereof, which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers unless the Commission finds that the contract, amendment, or modification thereof will be detrimental to

the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and provided the contract, amendment, or modification thereof, expressly (1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice; (2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days; (3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: *Provided, however*, That it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract; (4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available; (5) limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law: *Provided,*

however, That the contract may specify that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling; (6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice; (7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates; (8) excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots: *Provided, however*, That upon finding that economic factors so warrant the Commission may exclude from the contract any commodity subject to the foregoing exception; and (9) contains such other provisions not inconsistent herewith as the Commission shall require or permit. The Commission shall withdraw permission which it has granted under the authority contained in this section for the use of any contract if it finds, after notice and hearing, that the use of such contract is detrimental to the commerce of the United States or contrary to the public interest, or is unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. The carrier or conference of carriers may on ninety days' notice terminate without penalty the contract rate system herein authorized in whole or with respect to any commodity: *Provided, however*,

That after such termination the carrier or conference of carriers may not reinstitute such contract rate system or part thereof so terminated without prior permission by the Commission in accordance with the provisions of this section. Any contract, amendment, or modification of any contract not permitted by the Commission shall be unlawful, and contracts, amendments, and modifications shall be lawful only when and as long as permitted by the Commission; before permission is granted or after permission is withdrawn it shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract, amendment, or modification. As used in this section, the term 'contract shipper' means a person other than a carrier or conference of carriers who is a party to a contract the use of which may be permitted under this section."

SEC. 2. Section 15, Shipping Act, 1916, is amended to read as follows:

"SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transporation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or

apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of

other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonably notice without penalty for such withdrawal.

"The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

"Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 14b of this Act which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.

"Every agreement, modification, or cancellation lawful under this section, or permitted under section 14b, shall be excepted from the provisions of the Act approved July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', and amendments and Acts supplementary thereto, and the provisions of sections 73 to 77, both inclusive, of the Act approved August 27, 1894, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes', and amendments and Acts supplementary thereto.

"Whoever violates any provision of this section or of section 14b shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

SEC. 3. Notwithstanding the provisions of sections 14, 14b, and 15, Shipping Act, 1916, as amended by this Act, all existing agreements which are lawful under the Shipping Act, 1916, immediately prior to enactment of this Act, shall remain lawful unless disapproved, canceled, or modified by the Commission pursuant to the provisions of the Shipping Act, 1916, as amended by this Act: *Provided, however,* That all such existing agreements which are rendered unlawful by the provisions of such Act as hereby amended must be amended to comply with the provisions of such Act as hereby amended, and if such amendments are filed for approval within six months after the enactment of this Act, such agreements so amended shall be lawful for a further period of not to exceed one year after such filing. Within such year the Com-

mission shall approve, disapprove, cancel or modify all such agreements and amendments in accordance with the provisions of this Act.

SEC. 4. Section 18, Shipping Act, 1916, is hereby amended as follows:

(a) Insert "(a)" immediately after the section number "18".

(b) Add the following subsection 18(b):

"(b)(1) From and after ninety days following enactment hereof every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established. Such tariffs shall plainly show the places between which freight will be carried, and shall contain the classification of freight in force, and shall also state separately such terminal or other charge, privilege, or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates or charges, and shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transporation agreement. Copies of such tariff shall be made available to any person and a reasonable charge may be made therefor. The

requirements of this section shall not be applicable to cargo loaded and carried in bulk without mark or count.

"(2) No change shall be made in rates, charges, classifications, rules or regulations, which results in an increase in cost to the shipper, nor shall any new or initial rate of any common carrier by water in foreign commerce or conference of such carriers be instituted, except by the publication, and filing, as aforesaid, of a new tariff or tariffs which shall become effective not earlier than thirty days after the date of publication and filing thereof with the Commission, and each such tariff or tariffs shall plainly show the changes proposed to be made in the tariff or tariffs then in force and the time when the rates, charges, classifications, rules or regulations as changed are to become effective: *Provided, however*, That the Commission may, in its discretion and for good cause, allow such changes and such new or initial rates to become effective upon less than the period of thirty days ~~herein~~ specified. Any change in the rates, charges, or classifications, rules or regulations which results in a decreased cost to the shipper may become effective upon the publication and filing with the Commission. The term "tariff" as used in this paragraph shall include any amendment, supplement or reissue.

"(3) No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transporation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file

with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any priyilege or facility, except in accordance with such tariffs.

"(4) The Commission shall by regulations prescribe the form and manner in which the tariffs required by this section shall be published and filed; and the Commission is authorized to reject any tariff filed with it which is not in conformity with this section and with such regulations. Upon rejection by the Commission, a tariff shall be void and its use unlawful.

"(5) The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

"(6) Whoever violates any provision of this section shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

SEC. 5. Section 20, Shipping Act, 1916, is amended by changing the period at the end thereof to a semicolon and adding the following: "or to prevent any common carrier by water which is a party to a conference agreement approved pursuant to section 15 of this Act, or any other person subject to this Act, or any receiver, trustee, lessee, agent, or employee

of such carrier or person, or a[illegible]erson authorized by such carrier to rec[illegible]nation, from giving information to the con[illegible]any person, firm, corporation, or agency de[illegible]by the conference, or to prevent the confer[illegible]its designee from soliciting or receiving infor[illegible]for the purpose of determining whether a ship[illegible]or consignee has breached an agreement with the conference or its member lines or of determining whether a member of the conference has breached the conference agreement, or for the purpose of compiling statistics of cargo movement, but the use of such information for any other purpose prohibited by this Act or any other Act shall be unlawful."

SEC. 6. Section 16 First, Shipping Act, 1916 (39 Stat. 734; 46 U.S.C. 815), is hereby amended by deleting the period at the end thereof and adding the following: " : *Provided*, That within thirty days after enactment of this Act, or within thirty days after the effective date or the filing with the Commission, whichever is later, of any conference freight rate, rule, or regulation in the foreign commerce of the United States, the Governor of any State, Commonwealth, or possession of the United States may file a protest with the Commission upon the ground that the rate, rule, or regulation unjustly discriminates against that State, Commonwealth, or possession of the United States, in which case the Commission shall issue an order to the conference to show cause why the rate, rule, or regulation should not be set aside. Within one hundred and eighty days from the date of the issuance of such order, the Commission shall deter-

mine whether or not such rate, rule, or regulation is unjustly discriminatory and issue a final order either dismissing the protest, or setting aside the rate, rule, or regulation."

SEC. 7. The Shipping Act, 1916, is hereby amended by inserting a new section 43 reading as follows:

"SEC. 43. The Commission shall make such rules and regulations as may be necessary to carry out the provisions of this Act."

Approved October 3, 1961.

II. Review Act of 1950, 64 Stat. 1129, as amended, 5 U.S.C. §1031 *et seq.*:

Section 10, 5 U.S.C. §1040:

"An order granting or denying an interlocutory injunction under section 1039 (b) of this title shall be subject to review by the Supreme Court of the United States upon writ of certiorari as provided in Section 1254 (1) of Title 28: *Provided,* That application therefor be duly made within forty-five days after the entry of such order. The final judgment of the court of appeals in a proceeding to review under this chapter shall be subject to review by the Supreme Court of the United States upon a writ of certiorari in accordance with the provisions of section 1254 (1) of Title 28: *Provided further,* That application therefor be duly made within ninety days after the entry of such judgment. Either the United

States or the agency or an aggrieved party may file such petition for a writ of certiorari. The provisions of section 1254 (3) of Title 28, regarding certification, and of section 2101 (c) of Title 28, regarding stays, shall also apply to proceedings under this chapter."

III. Title 28 U.S.C.—Judiciary and Judicial Procedure:

Section 1254. Courts of appeals; certiorari; appeal, certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

Appendix C

Copy of
United States Shipping Board Bureau
Agreement No. 4844
Dated: January 8, 1936
Filed: January 14, 1936
Approved: February 12, 1936
Cancelled: June 30, 1939

THIS AGREEMENT made this 8th day of January, 1936, at New York, N.Y., between the GULF PACIFIC MAIL LINE, LTD., hereinafter called the "Intercoastal Carrier", party of the first part, and the members of the Far East Conference, hereinafter called the "Conference Carriers", party of the second part.

Witnesseth:

THAT, in consideration of the mutual benefits and advantages to be derived out of this agreement, and in order to stabilize rates in the trade under the jurisdiction of the Far East Conference, namely, from Atlantic and Gulf Ports of the United States to ports in Japan, Korea, Formosa, Siberia, Manchuria, China, Indo-China and the Philippine Islands, the parties hereto, common carriers by water subject to the Shipping Act, 1916, as amended, hereby agree with each other as follows:

1. The Intercoastal Carrier agrees that on all through shipments of cargo transported on vessels owned, controlled, chartered, and or operated by it from United States Atlantic or Gulf Ports for transshipment at Pacific Coast Ports to Ports under the jurisdiction of the Far East Conference, the through

rates which it will apply will be no lower than the rates provided in the tariffs of the Far East Conference, and that in connection with said through shipments it will abide by all applicable rules, regulations, and conditions of said Conference tariffs.

2. It is further agreed by the Intercoastal Carrier that it will transhipp all such cargo at Pacific Coast ports to vessels of carriers which are members of the Far East Conference and or the Pacific Westbound Conference.

3. The Conference Carriers agree that they will give the Intercoastal Carrier the privilege of participating in the carriage of cargo of shippers having contracts with Conference Carriers, at rates and under conditions provided in said contracts.

4. This agreement is subject to cancellation by either party giving thirty (30) days' written notice to the other party and to the United States Shipping Board Bureau, Department of Commerce, Washington, D.C.

GULF PACIFIC MAIL LINE, LTD.
Swayne & Hoyt, Ltd., Managing Agents
By: (Sgd) C. W. Cook G
Vice President

Appendix C

Filed by authority of and on behalf of the following Members of the Far East Conference:

AMERICAN PIONEER LINE
BARBER STEAMSHIP LINES, INC.
BANK LINE, LTD. (BANK LINE)
DOLLAR STEAMSHIP LINES, INC., LTD.
THE CHINA MUTUAL STEAM NAVIGATION COMPANY, LTD.
THE OCEAN STEAM SHIP COMPANY, LTD.
NEDERLANDSCHE STOOMVAART MAATSCHAPPIJ "OCEAAN"
(ALFRED HOLT & CO., Managers)
ELLERMAN & BUCKNALL STEAMSHIP CO., LTD.
NORTON, LILLY & COMPANY, as General Agents
ISTHMIAN STEAMSHIP COMPANY
KERR STEAMSHIP COMPANY, INC.
KOKUSAI KISEN KABUSHIKI KAISHA
NIPPON YUSEN KAISHA
OSAKA SHOSEN KAISHA
PRINCE LINE, LTD.

By: (Sgd.) PAUL ALBERT
Paul Albert, Secretary
Far East Conference

Dollar Steamship Lines, Inc., Ltd.
changed its name to
American President Lines, Ltd.
effective November 21, 1938.

Appendix D

F.M.B. Dockets 726, 733-4-5

Exhibit No. 166A
[Received 10/20/55]

List of Agreements approved under Section 15 of the Shipping Act, 1916, to which the members of the Far East Conference have been parties, and which contained provisions to the same effect as Article 3 of the F.M.B. Agreement No. 4844, which is Exhibit 166, in evidence.

Agreement No.	Party Other Than Members Of The Far East Conference	Date of Approval	If Terminated Or Cancelled, Applicable Date
3197	Argonaut Steamship Line Inc.	7/13/34	5/28/35
3198	McCormick Steamship Company	7/13/34	2/ 2/42
3199	(Grace Line) Panama Mail Steamship Company	7/13/34	6/30/39
3200	Luckenbach Steamship Company, Inc.	7/13/34	2/15/53
3201	American Line S.S. Corp. (Panama Pacific Line)*	7/13/34	3/ 7/39
3458	Nelson Steamship Company	9/ 3/34	5/12/38
3496	Sudden & Christenson (Harold Line)	10/11/34	1/ 4/53
3616	Luckenbach Gulf Steamship Company, Inc.	11/16/34	2/15/53
3652	American-Hawaiian Steamship Company	11/19/34	12/22/52

* By Agreement No. 6486 approved December 9, 1938, and cancelled April 15, 1953, Baltimore Mail Steamship Company (Panama Pacific Line) was substituted as a party in place of American Line S.S. Corp. (Panama Pacific Line).

Appendix D

Agreement No.	Party Other Than Members Of The Far East Conference	Date of Approval	If Terminated Or Cancelled, Applicable Date
3657	Williams Steamship Corporation	11/19/34	2/13/37
3720	Gulf Pacific Line, Swayne & Hoyt, Ltd., Managing Owners	11/28/34	4/12/40
4440	Dollar Steamship Lines, Inc., Ltd.	8/29/35	1/29/53
4465	Shepard Steamship Co.	10/16/35	2/21/42
4589	(Quaker Line) Pacific-Atlantic Steamship Co.	5/15/36	1/5/53
4591	States Steamship Company (California-Eastern Line)	10/22/35	1/5/53
4665	Pacific Coast Direct Line, Inc.	11/23/35	1/5/53
3957	Societa Franco-Iberique D'Armoment (Franco-Iberian Line)*	3/6/36	—

* Unlike all of the other Agreements in this enumeration which deal with initial carriage westbound by intercoastal carriers to Pacific coast ports for transshipment to destinations within the scope of the Far East Conference Agreement, this Agreement applies to carriage of goods on Franco-Iberian Line vessels from U.S. Atlantic or Gulf ports for through transportation with transshipment at European ports to ports within the scope of the Far East Conference Agreement.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] /83

GULF/MEDITERRANEAN PORTS CONFERENCE, ET AL., *Petitioners*,

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, H. KEMPNER, GALVESTON COTTON COMPANY, TEXAS COTTON INDUSTRIES, AND THE MEMBERS OF THE FAR EAST CONFERENCE, *Respondents*.

No. ~~1198~~ /66

FAR EAST CONFERENCE, AMERICAN PRESIDENT LINES, LTD., ISTHMIAN LINES, INC., ET AL., *Petitioners*,

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME COMMISSION, H. KEMPNER, GALVESTON COTTON COMPANY, AND TEXAS COTTON INDUSTRIES, INC., *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS, H. KEMPNER, GALVESTON COTTON COMPANY, AND TEXAS COTTON INDUSTRIES, IN OPPOSITION

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June 6, 1963

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1002

GULF, MEDITERRANEAN PORTS CONFERENCE, ET AL.,
Petitioners,

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, H. KEMPNER, GALVESTON COTTON COMPANY, TEXAS COTTON INDUSTRIES, AND THE MEMBERS OF THE FAR EAST CONFERENCE, *Respondents.*

No. 1138

FAR EAST CONFERENCE, AMERICAN PRESIDENT LINES, LTD., ISTHMIAN LINES, INC., ET AL., *Petitioners,*

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME COMMISSION, H. KEMPNER, GALVESTON COTTON COMPANY, AND TEXAS COTTON INDUSTRIES, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS, H. KEMPNER, GALVESTON COTTON COMPANY, AND TEXAS COTTON INDUSTRIES, IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported in 313 F. 2d 586. The opinion of the Federal Maritime

Board has not been officially printed, but appears in 1962 A.M.C. 743 *sub nom. Isbrandtsen Co., Inc.* v. *States Marine Co., of Delaware, et al.*

STATUTES INVOLVED

The statutes involved in this proceeding are: Sections 14 and 15 of the Shipping Act, 1916, 39 Stat. 733 (1916) as amended, 46 U.S.C. 812, 814 (as they existed prior to the Moratorium); the interim dual-rate Moratorium Act, Pub. L. 85-626, 85th Cong., 72 Stat. 574, together with its several extensions; and The Saving Statute, 1 U.S.C. 109, 61 Stat. 633. These statutes appear in Appendix A of this Brief.

COUNTER-QUESTIONS PRESENTED

The following are the only questions presented for determination by this Court:

1. Whether mere silence and inaction, on the part of the Federal Maritime Board, constituted formal or specific prior approval by the Board, required under Section 15 of the Shipping Act, 1916, as amended, of the institution of exclusive patronage contract non-contract dual-rate systems by the Petitioners herein, thereby giving the systems immunity under the Anti-trust laws.

2. Whether the dual-rate Moratorium Act, Pub. L. 85-626, 72 Stat. 574, retroactively destroyed Respondents' reparation claims existing, and being prosecuted, prior to its enactment.

COUNTER-STATEMENT OF THE CASE

This case involves the legality of the exclusive patronage contract/non-contract dual-rate systems employed by the Petitioners, Gulf-Mediterranean Ports Conference and its Member Lines, and the Far East Conference and its Member Lines.

The terms "exclusive patronage contract/non-contract dual-rate system", or "dual-rate system", as used herein, refer to a group of common carriers of freight by water, operating in a Conference, that charge different rates to shippers for identical transportation services, based solely upon whether the shipper agrees to give the carriers his entire patronage. The sole consideration for the enjoyment of the lower rate is the agreement of the shipper to patronize the Conference lines exclusively, and the sole reason for the exaction of the higher non-contract rate is the refusal of the shipper to sign exclusive patronage contracts with the Conference.

The Gulf-Mediterranean Ports Conference, and the Far East Conference, are voluntary associations of steamship lines operating (among other ports) between the Gulf of Mexico ports in the United States, and ports in the Mediterranean and in the Far East areas, respectively. The Board found that the basic agreements of both Conferences have never, and do not now contain any "provisions expressly authorizing the use of an exclusive patronage contract" or "differentials in freight rates for contracting shippers" (App. "A" 25, 28—Rep. of Bd.).[1]

On July 1, 1949, the Gulf-Mediterranean Ports Conference instituted the exclusive patronage dual-rate system on cotton, fixing the non-contract rates at 20%

[1] For the convenience of the Court we shall refer to the printed version of the Report of the Federal Maritime Board set out as Appendix "A" (App. "A"), to the Petition for Petitioners, Gulf-Mediterranean Ports Conference, *et al.* All other references in this Brief refer to the page number of the Joint Appendix (J.A.) filed in the Court of Appeals below, and constituting a part of the certified transcript of Record transmitted to the Supreme Court.

higher than the contract rates. The Far East Conference initiated its dual-rate system on cotton on February 7, 1950, with a spread or differential of $4.00 per ton between the contract and non-contract rates. Neither of the Conferences submitted the dual-rate arrangements to the Federal Maritime Board for approval, and the Trial Examiner expressly found that the "contract system" of either Conference had "never been specifically and separately approved by order under section 15 of the Act" (J.A. 413, 422—Examiner's Recommended Decision, Findings of Fact 31 and 57). These Findings of the Examiner were not disturbed by the Board.

It should be carefully noted with respect to the Far East Conference Petitioners that the exclusive patronage contract dual-rate system involved herein *is the one instituted on cotton on February 7, 1950.* Insofar as the Far East Conference is concerned, this was the *only* dual-rate system considered by the Board in its Report. It is especially important to bear this fact in mind, inasmuch as the Far East Conference Petitioners, in their Statement of the Case, have set forth at some length alleged facts, occurring over a period of approximately 21 years, concerning other dual-rate systems initiated by the Far East Conference prior to the one on cotton on February 7, 1950. Such alleged facts were not considered by the Board, and are wholly irrelevant and immaterial to the question of approval of the dual-rate system on cotton instituted on February 7, 1950.

Beginning in early 1951, and continuing thereafter, the Respondents herein (Complainants before the Board), while engaged in the business of exporting cotton from Gulf ports in the United States, made

certain shipments of high density cotton on Gulf-Mediterranean Ports, and Far East, Conferences' vessels, owned or operated by member lines. The steamship companies demanded of, and charged, the Respondents[2] the higher non-contract rates. At the times and dates that Respondents made said shipments, no other adequate means were available to transport said cotton (App. "A" 32-Rep. of Bd.).

In February and March of 1953, the Respondents filed Complaints with the Federal Maritime Board (F.M.B. Dockets 732-735) to recover reparations in the amount of the differential between contract rates and the higher charges paid by them on the various shipments. The Complaints alleged that the exclusive patronage contract dual-rate systems employed by the Gulf-Mediterranean Ports, and the Far East, Conferences, were illegal in that they were in violation of the Sherman Antitrust Act,[3] and Sections 14, 15, 16, and 17 of the Shipping Act of 1916, as amended.[4] Among the specified charges was the charge that the dual-rate systems had never been approved by the Board under Section 15 of the Act.

The Board consolidated the Complaints for hearing, together with a similar Complaint filed by Isbrandtsen Co., Inc. (F.M.B. Docket 726). The Board heard oral arguments in February, 1959, but withheld its

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[2] All known cotton exporters from the Gulf ports shipped under the contract rates (J.A. 416, 417, 421—Examiner's Findings 42, 43, 50). Thus the Conference had a 100% monopoly on the carriage of all cotton, other than Respondents'; cotton constituting the most important commodity and the "life blood" of the Gulf trade (J.A. 130, 172).

[3] 26 Stat. 209 (1890), as amended, 15 U.S.C. 1 *et seq.*

[4] 39 Stat. 733 (1916), as amended, 46 U.S.C. 812, 814; 39 Stat. 734 (1916), as amended, 46 U.S.C. 815, 816.

Report until the Supreme Court decided *Federal Maritime Board* v. *Isbrandtsen Co., Inc.*, 356 U.S. 481, and Congress had passed the Moratorium Act, Pub. L. 85-626, 72 Stat. 574, and the second extension thereof (App. "A" 21—Rep. of Bd.). The Report of the Board, decided August 4, 1961, was served August 9, 1961, together with its Order dismissing the Complaints.

On Petition for Review, the United States Court of Appeals for the District of Columbia Circuit, on January 10, 1963, reversed and remanded the matter to the Commission[5] for assessment of reparations. Petitions of the Gulf-Mediterranean Ports Conference, and Members of the Far East Conference, for Rehearing *en Banc* were denied *en Banc* on February 15, 1963, and February 26, 1963, respectively.

Any additional facts which may be applicable or pertinent to the determination of the questions presented will be set forth in the argument of the several propositions.

ARGUMENT

Preliminary Statement

These Cases Do Not Warrant Review on Writ of Certiorari

Rule 19 of the Supreme Court Rules provides that a review on Writ of Certiorari is a matter of judicial discretion, and will be granted only where there are special and important reasons therefor.

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[5] The Federal Maritime Board, which made the final Report and Order, was abolished, and all of its functions under the Shipping Act, 1916, 39 Stat. 728, *et seq.*, as amended, 46 U.S.C. 801, *et seq.*, insofar as here material, were transferred to the Federal Maritime Commission by Section 103(a) of Reorganization Plan No. 7 of 1961, effective August 12, 1961 (26 F.R. 7315).

In the instant cases there are no special and important reasons for the granting of the Writs, inasmuch as the underlying principles of the law involved have been clearly settled and decided. There is no conflict between the various Courts of Appeals, nor do the cases present important questions of Federal law which have not been, but should be settled by this Court, or which are in any way in conflict with this Court's decisions. In *Isbrandtsen Co., Inc.* v. *United States* (1954), 93 U.S. App. D.C. 293, 211 F. 2d 51, Cert. Den. (1954) 347 U.S. 990, where it was first specifically held that under Section 15 of the Shipping Act, 1916, a dual-rate system cannot be effectuated prior to formal or specific approval by the Federal Maritime Board, the Supreme Court denied a Writ of Certiorari. Similarly, the Supreme Court denied a Writ in *Pacific West-bound Conference* v. *Leval and Co.*, 201 Ore. 390, 269 P. 2d 541, Cert. Den. 348 U.S. 897 (1954), involving the same question. The fundamental principles of statutory construction applicable to the question concerning the retroactivity of the dual-rate system Moratorium Act have been decided by the Supreme Court in a long line of consistent decisions for well over 150 years.

Furthermore, the questions involved herein are of no public importance or interest, as distinguished from that of the parties (*Rice* v. *Sioux City Memorial Parks Cemetery* (1955), 349 U.S. 70, 74), inasmuch as the two year period of limitations, provided by Section 22 of the Shipping Act, has long since run on every other dual-rate reparation claim, except those of the Respondents, and of *Parsons & Whittemore, Inc.* v. *Rederiaktiebolaget Nordst-Jernan*, et al. (F.M.B. Dockets Nos. 805, 809-813), which, in so far as counsel can as-

certain, are the only dual-rate reparation claims that occurred prior to August 12, 1958, and which were filed within the two year statutory period.

It is, therefore, respectfully submitted that no special and important reasons for the granting of Writs of Certiorari exist in these cases.

I

THE COURT OF APPEALS PROPERLY FOUND THAT MERE SILENCE ON THE PART OF THE FEDERAL MARITIME BOARD DID NOT CONSTITUTE PRIOR APPROVAL UNDER SECTION 15 OF THE SHIPPING ACT OF THE EXCLUSIVE PATRONAGE DUAL-RATE SYSTEMS INVOLVED HEREIN

The Court of Appeals below, in a succinct and trenchant *Per Curiam* opinion, held that mere silence on the part of the Federal Maritime Board did not constitute prior approval under Section 15 of the Shipping Act, 1916,[6] of the exclusive dual-rate systems employed by the Petitioners herein, the Court stating (313 F. 2d 586-7):

> "The Federal Maritime Board denied reparations sought by the petitioners because of the imposition of dual rates said to have been unlawful. It held that, since it had not disapproved the rates, it had in effect approved them; . . . .
>
> "The discriminatory rates here involved were not approved by the regulatory agency merely because it was silent concerning them, and the rates were therefore illegal."

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[6] 39 Stat. 733 (1916), as amended, 46 U.S.C. 814 (as it existed prior to the Moratorium).

There is no conflict in the record with respect to the facts concerning the question of approval. It is undisputed that no efforts were ever made by either of the Conferences to obtain approval of the dual-rate systems, and that no action was ever taken by the Federal Maritime Board.

The Board, while recognizing that the Conference agreements of the Gulf-Mediterranean Ports Conference and of the Far East Conference contain no language or provisions expressly authorizing the use of an exclusive patronage contract or differentials in freight rates for contracting shippers, and that it had never *specifically* approved or authorized either of the two Conferences to institute, use or operate under the exclusive patronage contract/non-contract dual-rate system, nevertheless, erroneously found approval of such systems under Section 15 of the Shipping Act, as amended.

In support of this finding, the Board stated that it knew of the existence of the dual-rate systems in these Conferences, by virtue of the fact that said Conferences had filed certain minutes and tariffs with the Board indicating that they were using the systems. In this connection, the Board recited two extracts from minutes of the Gulf-Mediterranean Ports Conference, dated June 21, 1949, and February 1, 1950 (seven months after the institution of the system), which the Board stated established the *existence* of the practice (App. "A" 25-27-Rep. of Bd.).

Similarly, the Board referred to extracts from the minutes of special meetings of the Far East Conference on February 14 and 16, 1950, the system having been instituted on February 7, 1950 (App. "A" 29—

Rep. of Bd.).[7] It further appears from the Board's Report that tariffs containing the dual-rates were also filed, at sometime or other, with the Board by both Conferences.

The Board then stated, in substance, that since it took no action to disapprove the foregoing documents, it, therefore, approved the dual-rate systems, initiated by the Conferences, merely by doing nothing. This silence and inaction on the part of the Board was labeled by it as "tacit approval" (App. "A" 36—Rep. of Bd.), the Board stating:

> "Approval has been tacit where no action was taken and no order was issued, and this has always been considered as appropriate and consistent with Section 15."

The foregoing statement of the Board was in flagrant disregard of the decision in *Isbrandtsen Co., Inc.* v. *United States* (1954), 93 U.S. App. D.C. 293, 211 F. 2d 51, Cert. Den. (1954) 347 U.S. 990, where the

[7] The alleged "22" acts and documents referred to by the Far East Conference Petitioners (pp. 5-7, 12 of said Petitioners' Petition), occurring over about the same number of years, were not found by the Board, and; insofar as they occurred prior to the institution by the Far East Conference of the dual-rate system on cotton on February 7 1950, are in no way pertinent. The two "acts" which seem to have taken place subsequent to 1950 (see pp. 6-7 of Petition) are statements in a brief, and a ruling by the Board in a wholly extraneous matter where dual-rate contracts were not even mentioned. Furthermore, neither of these two "acts" involved the dual-rate system on cotton instituted on February 7, 1950.

It may be of interest to note that in the case of *Far East Conference* v. *United States* (1952), 342 U.S. 570, 578, where said brief was allegedly filed, Mr. Justice Douglas, in his dissenting opinion, explicitly found that there had been no approval of the dual-rate system used by the Far East Conference, stating that, "Here no effort was made to obtain it."

Court of Appeals, District of Columbia Circuit, explicitly held that under Section 15 of the Shipping Act, a dual-rate system cannot be effectuated prior to formal or specific approval by the Board. In that case, the Japan-Atlantic and Gulf Freight Conference in December, 1952, filed a statement with the Board, pursuant to the requirements of General Order 76, proposing initiation of an exclusive patronage contract/non-contract dual-rate system. In accordance with Board procedure, notice of the filing of the Conference's proposal was published in the Federal Register. The Attorney General, on behalf of the United States, and Isbrandtsen filed protests, and requested an immediate hearing. Thereafter, without a hearing, the Board issued an order permitting the proposed system to go into effect within forty-eight hours, setting a hearing date *subsequent* to the institution of the system. Upon application of Isbrandtsen, the Court of Appeals granted an interlocutory injunction.

The Court, in its decision, in addition to the question of jurisdiction, stated that the issue involved was "does the Shipping Act require Board approval of the dual rate system before it can become effective?" In deciding this issue in the affirmative, the Court stated (211 F. 2d 51, 56):

> "'*Agreements*' *referred to in the Shipping Act are defined to include 'understandings, conferences, and other arrangements.' Clearly, a scheme of dual rates like that involved here is an 'agreement' in this sense.* It can hardly be classified as an interstitial sort of adjustment since it introduces an entirely new scheme of rate combination and discrimination not embodied in the basic agreement. *But even if it were not a new agreement, it would certainly be classed as a 'modification' of the ex-*

isting basic agreement. In either case § 15 requires that such agreements or modifications 'shall be lawful only when and as long as approved' by the Board.[23] *Until such approval is obtained, the Shipping Act makes it illegal to institute the dual rate system. And this illegality cannot be spirited away by action which the Board labels 'interlocutory * * * of a discretionary nature.'"* (Emphasis supplied; footnotes deleted except footnote 23)

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[23] "We understand the Board to agree that if the dual rate agreement here requires Board approval under § 15, the agreement could not be validated by the General Order 76 procedure prior to such approval. See Board's Brief, p. 13."

The Board's analogy between the Shipping Act and the Interstate Commerce Act, under which "rates are effective and lawful merely upon filing" (*ibid.*), was found wanting (p. 57):

> *"In marked contrast, as we have seen above, the Shipping Act which governs here contemplates an entirely different scheme of regulation. It makes orders with respect to agreements unlawful until approved. This pre-approval illegality stems from the fact that the Shipping Act specifically provides machinery for legalizing that which would otherwise be illegal under the anti-trust laws.*
>
> The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the anti-trust laws any more than is necessary to serve the purposes of the regulatory statute. *But until this is done, the agreement is subject to the operation of the anti-trust laws, under which price fixing agreements are illegal per se."* (Emphasis supplied; footnotes deleted)

The foregoing case was cited and relied upon by the Supreme Court of Oregon in *Pacific West-bound Conference* v. *Leval & Co., Inc.* (1954), 269 P. 2d 541, Cert. Den. 384 U.S. 897; and in *River Plate & Brazil Conferences* v. *Pressed Steel Car Company Inc.*, (2d Cir. 1955), 227 F. 2d 60, wherein the dual rate systems involved were held to be illegal because not having had prior approval.[8]

In *River Plate & Brazil Conferences* v. *Pressed Steel Company, Inc.*, *supra*, the Court of Appeals for the Second Circuit, in holding that there was no approval, said (p. 63):

> "Such approval could not come subsequently, or retroactively, or by some interpretation of the Board made long after the event."

In the instant case, the Board's insistence that mere knowledge of the existence of the dual-rate systems, plus total inaction on its part, constituted Section 15 approval, is so clearly incompatible with *Isbrandtsen*, *supra*, as to make argument unnecessary.

In *Isbrandtsen*, *supra*, there was no "*tacit*" approval. There was an actual order of the Board authorizing the initiation of the system prior to a hearing thereon. It is submitted that this affirmative action carried incomparably greater weight than any so-called silent or "*tacit*" approval. Nevertheless, the system was held to be unlawful because there had been no formal approval. *A fortiori*, if the Board's affirmative Order

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[8] Accord: *Anglo Canadian Shipping Co.* v. *United States*, 264 F. 2d 405, 410, 411 (9th Cir. 1959); *Empire State Highway Transportation Ass'n., Inc.* v. *Federal Maritime Board* (1961), 110 U.S. App. D. C. 208, 291 F. 2d 336, 339 (D. C. Cir.), Cert. Den. 368 U. S. 931 (1961).

on a specific proposal for the initiation of a system was inadequate under the Shipping Act to legalize the dual-rate system, the Board's total silence and inaction, here, would be wholly ineffectual.

Finally, in further obvious refutation of the "*tacit*" or silent theory of approval advanced by the Board, there is the overall fatality implicit in the decision of *Isbrandtsen Co.* v. *United States* (1951), 96 F. Supp. 883, aff'd. (1952), by an equally divided Court *sub nom. Rederi* v. *Isbrandtsen Co.*, 342 U.S. 950. In that case the Court expressly stated that it was incumbent upon the Board to inquire into, and pass upon, considerations as to reasonableness of the spread or differential between the contract and non-contract rates. Of course, this necessary inquiry, prerequisite to the Board's approval, could not possibly have been made under a do nothing procedure, labeled by the Board as "tacit" approval. It is also in obvious refutation of, and incompatible with, the "precise findings by the Board as to a particular system's intent and effect", as stated by the Supreme Court *in Federal Maritime Board* v. *Isbrandtsen Co., Inc.*, 356 U.S. 481, 499.

Section 15 of the Act is a statutory directive which is mandatory, and which may not be dispensed with either by the wilful or careless disregard thereof by the carrier, or by the silent acquiescence therein by the Board. Approval must be actual and specific, and cannot be waived, or implied. The statutory mandate requiring prior approval not having been complied with by the Conferences, the dual rate systems employed by the Conferences were, necessarily, illegal, as found by the Court of Appeals, below.

II

THE 1958 MORATORIUM ACT DID NOT RETROACTIVELY DESTROY RESPONDENTS' REPARATION CLAIMS

The Petitioners seem to claim that the Moratorium Act (Pub. L. 85-626, 72 Stat. 574, August 12, 1958)[9] was retroactive in its effect and relieved them from all liability for reparations arising from a violation of the Shipping Act of 1916, which violation occurred long prior to the enactment of the Moratorium Act. The Court of Appeals below, *Per Curiam*, disposed of this contention by stating (313 F. 2d 586, 587):

> "We think, too, that the Moratorium Act is prospective only and so does not relieve an offender from liability for reparations arising from a violation which occurred prior to its enactment."

Retroactivity is not favored in law. For this there are sound reasons, in some cases, as in the instant case involving vested and substantial rights, serious constitutional ones.[10] However, we do not think that it is necessary for this Court to pass upon the question as to whether Congress had the power to make the legislation under consideration retroactive, for it is clear that Congress had no intention to make such legislation retroactive, nor did it, in fact, do so.

It is a firmly established and fundamental principal of statutory construction that all statutes are to be

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[9] Pub. L. 85-626, 72 Stat. 574, ceased to be effective on June 30, 1960, but was extended to June 30, 1961, by Pub. L. 86-542, 74 Stat. 253; being further extended to September 15, 1961, by Pub. L. 87-75, 75 Stat. 195; and was finally extended to October 15, 1961, by Pub. L. 87-252, 75 Stat. 521.

[10] Cf. *Forbes Pioneer Boat Line* v. *Board of Commissioners* (1922), 258 U. S. 338; *Ochoa* v. *Hernandez y Morales* (1915), 230 U. S. 139.

construed as having only a prospective operation, unless the Act clearly, by *express language*, or by *necessary* or *unavoidable implication*, requires a retroactive application. If any reasonable doubt exists, it should be resolved in favor of prospective operation. This rule has been recognized since the early days of the United States, and was trenchantly stated by this Court more than 157 years ago in *United States* v. *Heth* (1806), 3 Cranch 399, 413:[11]

> "Words in a statute ought not to have a retrospective operation, unless they are so clear, strong and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. * * *
>
> "To fortify the foregoing construction, it may be added, that the words of a statute, if dubious, ought, in cases of the present kind, to be taken most strongly against the law-makers."

[11] Also see: *Reynolds* v. *McArthur* (1829), 2 Pet. 417, 434; *Murray* v. *Gibson* (1853), 15 How. 420, 423; *Harvey* v. *Tyler* (1864), 2 Wall. 328, 347; *Sohn* v. *Waterson* (1873), 17 Wall. 596, 598; *Twenty Per Cent Cases* (1873), 20 Wall. 179, 187; *Auffmordt* v. *Rasin* (1880), 102 U. S. 620, 622; *Chew Heong* v. *United States* (1884), 112 U. S. 536; 559; *United States* v. *Burr* (1895), 159 U. S. 78, 82; *White* v. *United States* (1903), 191 U. S. 545, 552; *United States* v. *American Sugar Refining Co.* (1906), 202 U. S. 563, 577; *United States Fidelity and Guaranty Co.* v. *United States* (1908), 209 U. S. 306, 314; *Union Pacific Ry. R. Co.* v. *Laramie Stock Yards Co.* (1913), 231 U. S. 191, 199; *Shaw* v. *Doyle* (1922), 258 U. S. 529, 534; *Cox* v. *Hart* (1922), 260 U. S. 427, 434; *Fullerton-Krueger Lumber Co.* v. *Northern Pacific Ry. Co. et al.* (1924), 266 U. S. 435, 437; *United States* v. *St. Louis, S.F. & T.R. Co.* (1925), 270 U. S. 1, 3; *United States* v. *Magnolia Petroleum Co.* (1928), 276 U. S. 160-162; *Brewster* v. *Gage* (1929), 280 U. S. 327, 337; *Miller* v. *United States* (1935), 294 U. S. 435, 439; *Hassett* v. *Welch* (1938), 303 U. S. 303, 314; *Claridge Apartments Co.* v. *Commissioner of Internal Revenue* (1944), 323 U. S. 141, 164; 82 C.J.S., Statutes, Sections 414-415; Sutherland, Statutory Construction, 3rd Edition (1943), Vol. 2, Sec. 2201; Crawford Statutory Construction, (1940), Sec. 277.

Similarly, Mr. Chief Justice Marshall in *Reynolds v. McArthur* (1829), 2 Pet. 417, 434, said:

> "It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated, look forwards, not backwards; and are never to be construed retrospectively, unless the language of the act shall render such construction indispensable."

Indeed, as stated by Mr. Justice Peckham in *United States Fidelity and Guaranty Co. v. United States* (1908), 209 U.S. 306, 314, there is a presumption against retrospective operation, and a statute should not receive such a construction if it is susceptible of any other:[12]

> "There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied."

Certainly, there is no declaration of retroactivity, "*clear, strong* and *imperative*" in the language of the 1958 Moratorium Act which would justify a retroactive construction. In fact, there is nothing in the language of the Act, nor in its legislative history, which

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[12] See also: *White v. United States* (1903), 191 U. S. 545, 552; *United States v. American Sugar Refining Co.* (1906), 202 U. S. 563, 577; *Hassett v. Welch* (1938), 303 U. S. 303, 314; 82 C.J.S., Statutes, Sec. 415.

even remotely supports a retroactive construction. Had Congress so intended, it would have used correspondingly appropriate language, of which it is quite cognizable and capable.[13] To the contrary, the language of the Act was directed to the future, and Section 2 of the Act explicitly provided that "This Act shall be effective immediately upon enactment", thereby making it prospective only in its operation. 82 C. J. S., Statutes, Sec. 413.

1. The Legislative History of the Moratorium Act

On May 19, 1958, the Supreme Court decided the case of *Federal Maritime Board* v. *Isbrandtsen Co., Inc., et al*, 356 U.S. 481, 78 S. Ct. 851, stating (356 U.S. at p. 493):

> "Since the Board found that the dual-rate contract of the Conference was 'a necessary competitive measure to offset the effect of non-conference competition, required "to meet the competition of Isbrandtsen in order to obtain for its members a greater participation in the cargo moving in this trade,' it follows that the contract was a 'resort to to other discriminating or unfair methods' to stifle outside competition in violation of § 14 Third."[14]

This decision cast grave doubts upon the legality *per se* of all dual-rate systems[15] and Congress, in order

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[13] See Portal to Portal Act of 1947, 61 Stat. 84, 29 U.S.C. 251, *et seq.*

[14] 39 Stat. 733 (1916), as amended, 46 U.S.C. 812.

[15] As stated in Senate Report No. 860, August 31, 1961, 87th Cong. 1st Sess.: "... every effective dual-rate contract used by a conference is *intended*, and reasonably likely, and tends to cause nonconference lines *either to join the conference* using the contract or *to leave the trade for happy hunting elsewhere.*" (U.S. Code Congressional and Administrative News, 1961, Vol. 2, p. 3128). (Emphasis supplied).

to stay the effects of the decision pending such time that it could undertake and complete a thorough study of steamship conferences and their dual-rate practices,[16] passed the interim legislation amending Section 14 of the Shipping Act, 1916. That the sole and only purpose of the legislation was to stay the effects of the Supreme Court's decision in *Federal Maritime Board* v. *Isbrandtsen Co., Inc., supra,* is undisputed, and there is nothing in its legislative history to indicate otherwise.

Thus, the interim legislation authorized existing dual-rate arrangements *affected by the Isbrandtsen decision* to remain in effect.[17] However, it was never the intent or purpose of Congress in passing such legislation, to relax, modify, or render impotent, the then existing statutory procedures and requirements contained or implicit in other provisions of the Shipping Act, such as the necessity for prior approval under Section 15 (*Isbrandtsen Co., Inc.* v. *United States* (1954), 93 U.S. App. D.C. 293, 211 F. 2d 51, Cert. Den. (1954), 347 U.S. 990), and that the spreads or differentials between the contract and non-contract rates could not be arbitrarily fixed in violation of Sections 16 and

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[16] Sen. Rep. 1709, 85th Cong., 2d. Sess. 2 (1958); H. Rep. 2055, 85th Cong., 2d. Sess. 1 (1958); 104 Cong. Rec. 12908 (1958) (Chairman Magnuson); *id.* at 15641 (Chairman Bonner).

[17] However, even with respect to those, the Board still retained the power under the Moratorium Act to disapprove, cancel or modify, in accordance with the standards set forth in Section 15 of the Act, which standards contain, among other specified criteria, "or to be in violation of this chapter," as well as the approval requirement. Hence, the Board not only had the authority, but had a compulsive duty to determine the legality of any existing dual-rate system. *Anglo Canadian Shipping Co.* v. *United States,* 264 F. 2d 405, 411; *Isbrandtsen Co.* v. *United States,* 96 F. Supp. 883, 892.

17 (*Isbrandtsen Co., Inc.* v. *United States* (1951), 96 F. Supp. 883, aff'd. by an equally divided Court, *sub nom. Rederi* v. *Isbrandtsen Co.* 342 U.S. 950 (1952).

Thus, the purpose of the legislation was to "extend . . . the right of"[18] (S.R. No. 1497, June 1, 1960, 86th Cong. 2d Sess., U.S. Code Cong. and Adm. News, 1960, Vol. 2, p. 2461), or to "authorize"[19] (S.R. No. 860, Aug. 31, 1961, 87th Cong. 1st Sess., U.S. Code Cong. and Adm. News, 1961, Vol. 2, P. 3108), conferences to employ a dual-rate system. The clear intent and purpose of Congress was to permit or authorize the use of the dual-rate system, from the effective date of the first moratorium, notwithstanding *Isbrandtsen, supra,* if a conference so desired. *The criteria and standards contained in other provisions of the Shipping Act, and which had no bearing whatsoever on the question of illegality per se of dual-rate systems, were in no way disturbed.*

In *Anglo Canadian Shipping Company* v. *United States* (1959), 264 F. 2d 405, 410, the Court of Appeals, Ninth Circuit, after noting the provisions of Public Law 85-626, 72 Stat. 574, proceeded to hold that approval of the dual-rate agreement was required under Section 15 of the Shipping Act. It is further to be observed that the United States Court of Appeals, District of Columbia Circuit, in *Empire State Highway Transportation Association, Inc.* v. *Federal Maritime*

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[18] "Accordingly, H. R. 10840 would amend Public Law § 5-626 in order to extend for one year the *right of eligible conferences to employ a dual-rate system.*" (Emphasis supplied).

[19] "The primary purpose of this amended bill is to *authorize* ocean common carriers and conferences thereof serving the foreign commerce of the United States to enter into effective and fair dual-rate contracts with shippers." (Emphasis supplied)

Board (1961), 110 U.S. App. D.C. 208, 291 F. 2d 336, 341, Cert. Den. 368 U.S. 931, stated that in the wake of *Isbrandtsen, supra,* "Congress moved to preserve the *status quo* as far as dual-rate arrangements *affected* by that decision were concerned." (Emphasis Supplied). Thus, the effect of the interim legislation was limited to those dual-rate arrangements *affected* by the *Isbrandtsen* decision, and that *did not* include dual-rate arrangements that were invalid because there had been no prior approval, or because the spreads had been arbitrarily fixed without reference to an adequate determining principle or standard. Indeed the *status quo,* which existed as of the date of the *Isbrandtsen decision,* and which it was the purpose of the interim law to preserve,[20] clearly included the preservation of the approval requirement.[21]

It is submitted that the phrase "forbid or make unlawful" contained in Pub. L. 85-626, when viewed in light of the Act's legislative history, clearly refers to a *per se* illegality of the dual-rate system. And even with respect to this *per se* illegality, there is nothing

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[20] *Empire State Highway Transportation Ass'n, Inc. v. United States, supra,* 291 F. 2d at 341; 104 Cong. Rec. 12908 (1958) (Chairman Magnuson); *id.* at 15641 (Chairman Bonner); Hearings on H.R. 6775 Before the Merchant Marine & Fisheries Subcommittee of the Senate Commerce Committee, 87th Cong., 1st Sess. 16 (1961) (Chairman Celler); S. Rep. 1709, 85th Cong., 2d Sess. (1958), at 5, 6, 9 (Board Vice Chairman Guill); *id.* at 5 (Acting Secretary of Commerce Williams).

[21] That this is in accord with the intent of Congress is borne out by the Senate Report on the first extension of the Moratorium. The Committee described the Moratorium as allowing "the continued use by conferences of a dual rate system *validly* in effect on the date of the Supreme Court's decision." S.R. No. 1497, 86th Cong., 2d Sess. 2 (1960), U.S. Code Cong. and Adm. News, 1960, Vol. 2, p. 2461. (Emphasis supplied)

in the Act, nor in its legislative history, that would require a retroactive construction.

However, this Court need not decide the question as to whether the Moratorium Act legalized dual-rate systems not theretofore approved by the Board. The issue in this case is considerably more limited—whether the interim dual-rate legislation *retroactively* validated existing unapproved dual-rate systems, thereby retroactively destroying reparation claims which had previously arisen. When the intent of Congress to wipe out the approval requirement *even prospectively* is so ambiguous, *a fortiori* there can be no valid basis for concluding that the approval requirement was abolished retroactively for the period prior to the enactment of the interim legislation.

It is submitted that, so far from the Court being compelled by the language of the Act to give a retrospective operation, the plain and obvious meaning of the Act, interpreted with reference to the general scope and declared legislative purpose, utterly forbids the conclusion that there was any intention to impair or destroy rights previously existing.[22] Certainly, there is no declaration of retroactivity "so clear, strong and imperative, that no other meaning can be annexed", nor does the intention of Congress demand such a construction.[23]

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[22] The letter from the Department of Justice to Chairman Bonner of the House Committee, referred to by Judge Danaher in his dissenting opinion (313 F. 2d 586, 587), is entirely inapposite to the question of retroactivity, since, at the most, it merely expresses an opinion as to the possible *future* effects of the proposed legislation

[23] *United States* v. *Heth* (1806), 3 Cranch 399, 413, *supra*, and cases cited in footnote 11, *supra*.

2. The Respondents' Reparation Claims Are Preserved by the General Saving Statute

Title 1, U.S.C., Section 109 (61 Stat. 633) provides in pertinent part:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

It is to be noted that this statute not *only* saved from extinction a liability incurred under the repealed statute, but it saved the statute itself "for the purpose of sustaining any proper action . . . for the enforcement of such . . . liability." *De La Rama S.S. Co., Inc.* v. *United States* (1953), 344 U.S. 386, 389. This statute applies not only in the case of repeal, but also to amendments, for in either event a new statute comes into being, and the old one ceases to exist. *Morehead* v. *Hunter* (10 Cir., 1952), 198 F. 2d 52, 53; *United States* v. *Taylor* (S.D.N.Y. 1954), 123 F. Supp. 920, 922, aff'd. 227 F. 2d 958, Cert. Den. 353 U.S. 961; *National Labor Relations Board* v. *National Garment Co.* (8 Cir., 1948), 166 F. 2d 233, 236-237.

While these Respondents contend that the dual-rate Moratorium Act was clearly prospective in its operation, nevertheless, even if it were retroactive in any respect, there can be no question but that the liabilities of the carriers which Respondents sought to enforce before the Board fall directly within the purview of Section 109. Hence, since the interim dual-rate Moratorium did not "expressly provide" that such liability

was to be "released" or "extinguished", the Respondents' claims were preserved, to the extent that they existed prior to the Moratorium of August 12, 1958.

III

THE QUESTION OF DAMAGES IS NOT PROPERLY BEFORE THIS COURT

The Far East Conference Petitioners have raised the question concerning the assessment of reparations, the essence of said Petitioners' contention being that the Respondents have not proved the proper measure of damages.

This question was not passed upon by either the Federal Maritime Board, or the Court of Appeals below. The Board, in its Report, upon finding that no liability, of any nature whatsoever, existed by virtue of the fact that the dual-rate systems had been properly approved, and were otherwise legally instituted, issued an Order dismissing the Complaints without passing upon the question of reparations, or the measure thereof. Although the question concerning the measure of damages was raised in the Briefs of all Parties upon appeal to the United States Court of Appeals for the District of Columbia Circuit, the Court of Appeals did not pass upon this question, but remanded the matter to the Commission for assessment of reparations. Apparently, this action on the part of the Court of Appeals was induced by the fact the Court considered that it was within the province of the Commission to pass upon the matter in the first instance. *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474; *Far East Conference* v. *United States*, 342 U.S. 570.

Since, under the foregoing cases, the Federal Maritime Commission has the primary jurisdiction to pass

upon this question, it is submitted that the action of the Court of Appeals, in remanding the case to the Commission for assessment of reparations, was entirely proper.

CONCLUSION

For the foregoing reasons, it is submitted that the Petitions of the Gulf-Mediterranean Ports Conference, et al., and of the Far East Conference, et al., for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, should be denied.

Respectfully submitted,

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June 6, 1963

APPENDIX A

STATUTES INVOLVED

Sections 14 and 15 of the Shipping Act, 1916, 39 Stat. 733, as Amended (extracted from Title 46, U..S. C. A.)

Sec. 14. (46 U. S. C. sec. 812.) No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow a deferred rebate to any shipper. The term "deferred rebate" in this chapter means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this chapter means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense.

* * * * *

Sec. 15. (46 U. S. C. sec. 814.) Every common carrier by water, or other person subject to this chapter, shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between ex-

porters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.

All agreements, modifications, or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

Public Law 85-626; 72 Stat. 574

[S. 3916]

An Act to amend the Shipping Act, 1916.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, THAT:

Section 14 of the Shipping Act, 1916, is amended by inserting at the end thereof the following: "Provided, That nothing in this section or elsewhere in this Act, shall be construed or applied to forbid or make unlawful any

dual rate contract arrangement in use by the members of a conference on May 19, 1958, which conference is organized under an agreement approved under section 15 of this Act by the regulatory body administering this Act, unless and until such regulatory body disapproves, cancels, or modifies such arrangement in accordance with the standards set forth in section 15 of this Act. The term 'dual rate contract arrangement' as used herein means a practice whereby a conference establishes tariffs of rates at two levels the lower of which will be charged to merchants who agree to ship their cargoes on vessels of members of the conference only and the higher of which shall be charged to merchants who do not so agree."

Sec. 2. This Act shall be effective immediately upon enactment and shall cease to be effective on and after June 30, 1960.

Approved August 12, 1958.

Public Law 86-542; 74 Stat. 253

[H. R. 10840]

An Act to amend Public Law 85-626 relating to dual rate contract agreements.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, THAT:

Section 2 of the Act entitled "To amend the Shipping Act, 1916", approved August 12, 1958 (72 Stat. 574), is amended by striking out "1960" and inserting in lieu thereof "1961".

Approved June 29, 1960.

Public Law 87-75; 75 Stat. 195

[S. 2154].

An Act to amend Public Law 85-626, as amended by Public Law 86-542, relating to dual rate contract agreements.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, THAT:

Section 2 of the Act entitled "To amend the Shipping Act, 1916", approved August 12, 1958 (72 Stat. 574), as amended by an Act approved June 29, 1960 (74 Stat. 253), is further amended by striking out "June 30, 1961" and inserting in lieu thereof "September 15, 1961".

Approved June 30, 1961.

Public Law 87-252; 75 Stat. 521

[H. R. 3156]

* * * * * * *

SEC. 2. That section 2 of the Act of August 12, 1958, as amended, is amended to reads as follows:

"SEC. 2. This Act shall be effective immediately upon enactment and shall cease to be effective on and after October 15, 1961: *Provided, however*, That contracts in effect midnight September 14, 1961, shall remain in effect until midnight October 15, 1961, unless such contracts terminate earlier by their own terms, or are rendered illegal under the terms of the first section of this Act."

Approved September 16, 1961.

The **Saving statute, Title 1, U.S.C., Section 109,** provides as follows:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. July 30, 1947, c. 388, § 1, 61 Stat. 633.

Supreme Court of the United States

OCTOBER TERM, 1962

No. ~~1388~~ 166

FAR EAST CONFERENCE, AMERICAN PRESIDENT LINES, LTD., ISTHMIAN LINES, INC., et al.,

Petitioners,

—against—

UNITED STATES OF AMERICA, FEDERAL MARITIME COMMISSION, H. KEMPNER, GALVESTON COTTON COMPANY and TEXAS COTTON INDUSTRIES, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 1138

FAR EAST CONFERENCE, AMERICAN PRESIDENT LINES, LTD., ISTHMIAN LINES, INC., et al.,

Petitioners,

—against—

UNITED STATES OF AMERICA, FEDERAL MARITIME COMMISSION, H. KEMPNER, GALVESTON COTTON COMPANY and TEXAS COTTON INDUSTRIES, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

The petitioners, all of whose names appear in the first paragraph of the petition, are reluctant to submit a Reply Brief but feel compelled so to do because the briefs in opposition have, on two points, dealt with matters of substantial importance in a manner which petitioners were unable to foresee and hence to treat adequately in the petition.

I

The Extension of the Far East Conference Contract System to Cotton Was Not a New Agreement Requiring Separate Approval

The petition for certiorari enumerated 22 separate and formal actions taken by the regulatory agency over the years between 1929 and 1952 which constituted indubitable evidence of approval. The briefs of the Department of Justice and of the Kempner interests have not challenged our contention that these successive agency actions evidenced approval of the Far East Conference contract system. Instead, they have resorted to the ingenious device of designating the extension to baled cotton of the existing approved system as the establishment of a *new system* which, they argue, required an approval separate from that given to the system itself.

It is clear from the record that the act of the Far East Conference in acceding to the request of the cotton shippers for dual rates and an exclusive patronage contract constituted a mere extension of the long existing contract system to baled cotton and not the initiation of a new contract system. The Far East Conference insisted that the same conditions and the same spread which were characteristic of its twenty year old contract system should merely be extended so as to include baled cotton (J.A. 162-163, 187).

Isbrandtsen Co. v. United States, 93 App.D.C. 293, 211 F.2d 51 (1954), established the necessity for approval of contract systems. It did not establish

the proposition that a new approval would be required each time that the system was extended to an additional commodity. The rationale of the Court of Appeals appears in 211 F.2d at 56:

> "* * * Clearly, a scheme of dual rates like that involved here is an agreement in this sense. It can hardly be classified as an interstitial sort of adjustment since it introduces an *entirely new scheme of rate combination and discrimination* not embodied in the basic agreement." (Emphasis supplied)

The approval of the Far East Conference's introduction of "an entirely new scheme of rate combination and discrimination" had, as we have shown, been manifested many times before the system was extended to cotton. There is nothing in *Isbrandtsen Co.* or any of the cases which follow it which suggests that new approval is required whenever a new commodity comes within the scope of the system or when the rates are changed. After the contract system had, in February, 1950, been extended to cotton, the Commission decided *American Hawaiian Steamship Co. et al. v. Intercontinental Marine Lines, Inc.*, 4 F.M.B. 160 (1953), which is briefly referred to at page 7 of our petition. What is not there said, however, is that it appears from the report that Intercontinental was organized by three contract shippers who proposed to operate only *from the Gulf to Japan.* The respondents have adequately advised this Court that the "life blood" of the trade from the Gulf to Japan is cotton, and it is clearly inferable that it was the Far East Conference contract system as applied to cotton among other commodities, which was referred to re-

peatedly in the Board's report, and in the portion of that report which was quoted in our petition, page 7.

What we have said above is merely intended to demonstrate that the final decision by this Court of what agency action constitutes approval of all types of 15 agreements is definitely involved in, and decisive of, one of the facets of this case on the merits.

II

Section 3 of Public Law 87-346

At pp. 14-16 of the petition, we stressed that the *interim* legislation was retroactive in its effects to the extent of substituting the concept of the legality of contract rate systems which were in use on May 19, 1958 until disapproval by the Commission for the concept of illegality prior to approval, announced in *Isbrandtsen Co. v. United States*, 211 F.2d 51, certiorari denied, 347 U.S. 990. At pp. 14-15 of our petition, we pointed out that §3 of the *permanent* legislation (Pub. L. 87-346) (printed at p. 13-15 of our petition) perpetuated this concept as to legality of contract systems in use on May 19, 1958.

We little foresaw that the respondents in their briefs in opposition here would ignore the effect of §3. Although both briefs in opposition print in their appendices considerable legislation, and the Department of Justice in its appendix does print §14b of the Shipping Act, as added by Pub. L. 87-346, which does not bear on the subject of retroactivity in the case of

any of the numerous May 19, 1958 contract systems, the brief of neither of the respondents discusses, or even prints in its appendix the text of, §3 which we urge is decisive on this important aspect of this case and the proper interpretation of this new and far-reaching legislation.

The silence of the respondents on this subject seems evidence of their inability to answer this argument.

CONCLUSION

For these additional reasons, the petition should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1002

GULF-MEDITERRANEAN PORTS CONFERENCE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME COMMISSION, ET AL.

No. 1138

FAR EAST CONFERENCE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 313 F. 2d 586. The opinion of the Federal Maritime Commission is reported unofficially at 1962 Am. Mar. Cas. 743.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1963 (Gulf Pet. 59; Far East Pet. A-1), and petitions for rehearing were denied as to Gulf on February 15, 1963 (Gulf Pet. 64) and as to Far East on February 26, 1963 (Far East Pet. 3). The petition of Gulf for a writ of certiorari in No. 1002 was filed on April 9, 1963, and that of Far East in No. 1138 was filed on May 27, 1963. The jurisdiction of this Court is invoked in both cases under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the failure of the Federal Maritime Commission to disapprove an exclusive-patronage dual-rate system constituted the approval required to legalize the system under Section 15 of the Shipping Act prior to its amendment in 1961.

2. Whether the now-expired dual-rate Moratorium Act of 1958 relieved common carriers by water of reparations liability accruing prior to its enactment for their unlawful use of unapproved dual-rate systems.

STATUTES INVOLVED

Portions of the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. 801 *et seq.*, and 1 U.S.C. 109, are set out in the Appendix, *infra*.

STATEMENT

Petitioners Gulf-Mediterranean Ports Conference and Far East Conference are voluntary associations composed of common carrier steamship lines engaged

in the transportation of property between various American and foreign ports. Both petitioners operate as conferences pursuant to general or basic agreements first approved by the Shipping Board[1] in 1930 (in the case of Gulf-Mediterranean) (Gulf Pet. 5, 25), and in 1922 (in the case of Far East) (Far East Pet. 5, 6). This case involves the legality of the dual-rate contract systems employed by petitioners in 1951 and 1952. Under these systems, shippers who agree with the Conference to deal exclusively with Conference members, and not with independent carriers in the trade served by the Conference, receive the benefit of rates lower than those charged shippers who do not so agree. The systems are established by agreement among the members of the Conference. Petitioners' basic agreements, which have from time to time been amended, have never contained any provisions expressly authorizing the use of an exclusive-patronage contract or differentials in freight rates

[1] The Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. 801 *et seq.*, established the United States Shipping Board to administer the new law. In 1933 the Shipping Board was abolished. Its functions were transferred to the Department of Commerce and in 1936 were assigned to the United States Maritime Commission, which in 1950 was in turn replaced by the Federal Maritime Board. See *Isbrandtsen Co. v. United States*, 96 F. Supp. 883, 886-87, n. 7 (S.D.N.Y.), affirmed by an equally divided Court *sub nom. Federal v. Isbrandtsen Co.*, 342 U.S. 950. Under Section 103 of Reorganization Plan No. 7 of 1961, 26 Fed. Reg. 7315, the five-member Federal Maritime Commission succeeded to the regulatory powers and duties of the Maritime Board, which was abolished by Section 304 of the Plan. For convenience we shall refer to the agency as the Commission regardless of the date involved.

in favor of contracting shippers (Gulf Pet. 25–28; Far East Pet. 5).

Until 1949 neither Conference offered an exclusive patronage rate differential to shippers of cotton (Gulf Pet. 26, 29–30; Far East Pet. 7–8). In that year, however, a cotton dual-rate system was initiated by Gulf-Mediterranean, and in 1950 by Far East (*ibid.*). In accordance with what was their customary practice, neither Conference submitted the arrangement to the Commission for formal approval (Gulf Pet. 5, 6, 25, 28; Far East Pet. 8). Nevertheless, routine tariff revisions containing dual rates for cotton were filed by both, as well as minutes of Conference meetings in which references were made to cotton dual-rate arrangements (Gulf Pet. 6, 35–36; Far East Pets. 5, 8).

The present case was initiated by the Kempner respondents (H. Kempner, Galveston Cotton Co. and Texas Cotton Industries), shippers of cotton from ports on the Gulf of Mexico to various destinations in the Mediterranean and the Far East, which, beginning in 1950, were charged the higher noncontract rate for shipments on Conference vessels (Gulf Pet. 5, 31; Far East Pet. 8). The differential between contract and noncontract rates was 8½ per ton for the Far East Conference and 20 percent for the Mediterranean Conference (Gulf Pet. 32).

In early 1953 the Kempner respondents filed complaints with the Commission against the Conferences and their carrier members, claiming reparations in the amount of the differential between contract rates and the charges paid by them on various shipments

made in 1951 and 1952. The exclusive-patronage dual-rate systems employed by the Conference were alleged to violate the Shipping Act of 1916 and the Sherman Antitrust Act. Complainants charged that the dual-rate systems which covered their shipments violate Section 14 of the Shipping Act; that the arrangements had never been, and could not lawfully be, legalized by approval of the Commission; and that the systems and the rates thereunder were unduly and unreasonably prejudicial, discriminatory, and disadvantageous in violation of Sections 16 and 17 of the Shipping Act (Gulf Pet. 19–21).

The Commission consolidated the complaints for hearing with a similar complaint filed by Isbrandtsen Co., an independent carrier which had dealt as a shipper at noncontract rates with members of the Conference in order to meet its obligations to the Kempner respondents for the carriage of certain shipments (Gulf Pet. 21). In 1957, after hearings, the examiner submitted a recommended decision. In 1959, after oral argument before it, the Commission postponed resolution of the controversy until the completion of "pending litigation and Congressional legislation" with respect to dual-rate systems. After further argument in 1961, the Commission, then consisting of two members, issued its report on August 9, 1961 (*ibid.*).

The "pending litigation" of which the Commission had spoken was the litigation culminating in the decision of this Court in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481. There the Court held that a conference dual-rate system with the purpose

or effect of stifling independent competition was a violation of Section 14 of the Shipping Act. Immediately following the decision, Congress enacted the dual-rate moratorium Act, August 12, 1958 (72 Stat. 574) which added to Section 14 a proviso:

> * * * That nothing in this section or elsewhere in this Act, shall be construed or applied to forbid or make unlawful any dual rate contract arrangement in use by the members of a conference on May 19, 1958, which conference is organized under an agreement approved under section 15 of this Act by the regulatory body administering this Act, unless and until such regulatory body disapproves, cancels, or modifies such arrangement in accordance with the standards set forth in section 15 of this Act.

The moratorium, as extended, remained in effect until the passage of the 1961 amendments to the Shipping Act (75 Stat. 762), which added the explicit requirement that Commission approval of a dual-rate system shall be "by order" (46 U.S.C. 813a).

The Commission concluded that the Kempner respondents were not entitled to reparations for the amounts they paid to Conference members in excess of contract rates.[2] The dual-rate systems they challenged were found to have received official sanction by

[2] The Commission found, however, that Isbrandtsen had been improperly denied the right to sign an exclusive-patronage contract and thereby obtain the benefit of the lower contract rates, and awarded Isbrandtsen reparations against States Marine Lines and Waterman S.S. Corp., the carriers to whom the higher rate had been paid (Gulf Pet. 55). States Marine petitioned for review of this portion of the order and Isbrandtsen petitioned for review of the order insofar as interest on the amount of its award was denied. The court of appeals affirmed

the Commission's approval of the Conferences' basic organizational agreements, as well as its acceptance for filing of, and failure to act upon, (a) the minutes of Conference meetings containing references to the dual-rate contract arrangements, and (b) the tariffs of Conference members containing both contract and noncontract rates (Gulf Pet. 35–36). The Commission also seems to have held that the 1958 amendment to Section 14 of the Shipping Act had retroactively legalized the dual-rate systems of which petitioners complained (Gulf Pet. 33, 45–46, 48). Finally, the Commission found that the contract-noncontract rate differentials were not discriminatory, unfair, or detrimental to the commerce of the United States, nor were they unreasonably or unduly prejudicial (Gulf Pet. 51). Accordingly, the Commission denied the Kempner respondents the reparations they sought and refused to disapprove the challenged dual-rate systems (Gulf Pet. 55–58).

The Kempner respondents filed a petition to review the order of the Commission. The United States, a statutory respondent by virtue of Section 4 of the Judicial Review Act (5 U.S.C. 1034), confessed error on the ground that the challenged dual-rate systems were illegal in that (a) they had not been approved, and (b) the 1958 statutory amendment did not retroactively legalize the systems and thus cut off accrued reparations liability.

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the award of reparations but reversed the denial of interest. States Marine has petitioned for certiorari to review that decision. *States Marine Lines, Inc.* v. *Federal Maritime Commission*, No. 1082, this Term.

The court of appeals agreed and remanded the case to the Commission for the assessment of reparations. It held *per curiam* that the silence of the Commission did not constitute "approval" of the discriminatory rates, and that the rates were therefore unlawful. It further concluded that the 1958 amendment was prospective only and hence does not relieve an offender from liability for reparations arising from a violation which occurred prior to its enactment (Gulf Pet. 60-61).

The Federal Maritime Commission has not sought certiorari to review the judgment below.

ARGUMENT

The decision of the court of appeals was plainly correct. In any event, the issues raised have no current significance, since petitioners' contentions are based upon statutory language which has subsequently been repealed or amended, and the statute of limitations has already run with respect to any similar claims which might be governed by the language involved here.

1. The court below correctly concluded that Commission approval of a dual-rate system must evidence an evaluation of the merits of the arrangement more clearly than does the "tacit approval" alleged. This Court, confirming the consistent rulings of the lower courts, has held that approval of a dual-rate system must be given, if at all, on the basis of "precise findings" on the purpose and effect of the arrangement. *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 499. *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51, 57 (C.A.D.C.), certiorari denied, 347 U.S. 990;

River Plate & Brazil Conferences v. *Pressed Steel Car Co.*, 227 F. 2d 60, 63 (C.A. 2); *Pacific Westbound Conference* v. *Leval & Co.*, 201 Ore. 390, 269 P. 2d 541, certiorari denied, 348 U.S. 897; *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883, 886, 892 (S.D.N.Y.), affirmed by an equally divided Court *sub nom. Rederi* v. *Isbrandtsen Co.*, 342 U.S. 950; *Isbrandtsen Co.* v. *United States*, 81 F. Supp. 544 (S.D.N.Y.), appeal dismissed *sub nom. Rederi* v. *Isbrandtsen Co.*, 336 U.S. 941. In light of the antitrust immunity which its approval affords, *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87; *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51, 57 (C.A.D.C.), certiorari denied, 347 U.S. 990, it is incumbent on the Commission to make findings which will ensure the effectiveness of an agency check on conference behavior. Cf. *Silver* v. *New York Stock Exchange*, No. 150, this Term, decided May 20, 1963, slip op., pp. 17. Plainly, the "tacit approval" for which petitioners argue (Gulf Pet. 7–8, 11–12; Far East Pet. 6–7, 12) does not meet the standard of responsible and articulate consideration which the Shipping Act imposes. Nor may counsel now seek, as does petitioner Far East (Far East Pet. 12), to draw inferences of approval from agency actions which the Commission never considered to constitute the deliberate exercise of judgment required by the Act. See *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167–169.

We note that the "tacit approval" of the dual-rate system for which petitioners contend occurred, according to the Commission, in 1949 for the Mediterranean Conference and in 1950 for the Far East Conference (Gulf Pet. 36). This was 4 and 5 years, respectively, before *Isbrandtsen Co.* v. *United States*, 211

Nor is there any merit in petitioners' contention that the moratorium Act of 1958 retroactively validated the unapproved dual-rate systems then in use. Indeed, it is not clear that Congress intended to legalize such arrangements even prospectively, much

F. 2d 52, *supra*, made clear beyond doubt that prior Commission approval of dual-rate arrangements was necessary. At the time that the "tacit approval" is said to have taken place, the Commission treated dual-rate arrangements as an ordinary tariff change with respect to which no administrative action was necessary (*Isbrandtsen Co. v. United States*, 211 F. 2d at 56). The Commission brief upon which petitioner Far East relies (Far East Pet. 7) merely restated the agency's argument since rejected in *Isbrandtsen Co. v. United States*, 211 F. 2d at 56—that approval of a basic conference agreement was sufficient to legalize the conference's dual-rate systems. The Commission's General Order 76, moreover, which required the filing of specific information regarding dual-rate systems and which was admittedly adopted in order to provide the Commission with necessary information it theretofore had lacked regarding dual-rate arrangements, was not issued until 1953. *See Isbrandtsen Co. v. United States*, 211 F. 2d at 53, n. 2. And the Commission has stated to the court of appeals that approval of a dual-rate arrangement was not obtained even by filing of the information required by General Order 76. Brief for the Federal Maritime Board, p. 17, *Isbrandtsen Co. v. United States*, 211 F. 2d 51, *supra*.

See *Anglo Canadian Shipping Co., Ltd. v. United States*, 251 F. 2d 405, 410–411, 414 (C.A. 9); S. Rep. 1297, 85th Cong., 2d Sess. 2 (the moratorium Act allows "the continued use by conference of a dual-rate system *validly in effect on the date* of [this Court's] decision" (emphasis added)) in *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481). And the "status quo" which the moratorium Act was intended to preserve (*see Empire State Highway Transportation Ass'n, Inc. v. Federal Maritime Board, supra*, 291 F. 2d 336, 341 (C.A.D.C.), certiorari *denied*, 368 U.S. 931; 104 Cong. Rec. 12908, 13041; Hearings on H.R. 677 Before the Merchant Marine and Fisheries Subcommittee of the Senate Commerce Committee, 85th Cong., 1st Sess. 16; S. Rep. 1709, 85th Cong., 2d Sess. 5, 6, 9) plainly included

less to relieve carriers of liability for reparations arising out of violations committed before the adoption of the Act. Compare, *e.g.*, the Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U.S.C. 251 *et seq.* Retroactivity, this Court has noted, "is not favored, except upon the clearest mandate." *Claridge Apartments Co.* v. *Commissioner*, 323 U.S. 141, 164. Moreover, an interpretation of the moratorium Act which would retroactively destroy petitioners' accrued liability under the Shipping Act is precluded by 1 U.S.C. 109, which provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. * * *

In an analogous context this statute was held (in an opinion subsequently relied upon by this Court in *Great Northern Railway Co.* v. *United States*, 208 U.S. 452, 469) to authorize the prosecution of a rail common carrier for failure to file rates in accordance

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the rule that unapproved dual-rate arrangements were unlawful, would remain unlawful unless and until approved, and even if once approved would become again unlawful if subsequently disapproved.

To the extent that the so-called Moratorium Act operated, as petitioners suggest (Gulf Pet. 14-15; Far East Pet. 14), as a limitation upon the jurisdiction of tribunals, its expiration before decision in the court of appeals left that body free to rule as it did with respect to the sufficiency of the Commission's "approval" of the dual-rate systems at issue.

with the Elkins Act, 32 Stat. 847, notwithstanding that the relevant provisions of the Elkins Act had been replaced by the Hepburn Act, 34 Stat. 584, before the indictment was returned. *United States* v. *New York Cent. & H. R. R. Co.*, 153 Fed. 630, 635 (W.D.N.Y.), reversed on other grounds, 166 Fed. 267 (C.A. 2). See also *Moorehead* v. *Hunter*, 198 F. 2d 52 (C.A. 10) (holding that Section 109 applies in cases of amendment as well as repeal).[6]

2. In any event, since Section 14b of the Shipping Act (pp. 14–16, *infra*), added in 1961 requires a formal Commission order of approval, the nature of the approval required for dual-rate systems by the pre-1961 version of the statute has become a matter of purely historical concern.[7] Nor would resolution of the issue by this Court affect any significant number of cases involving events prior to 1961. The limitations period for reparations actions before the Federal Maritime Commission is two years (46 U.S.C. 821). Hence any claim based upon the illegality of a dual-rate system which accrued before May 19, 1958—the critical date specified in the moratorium law—would have had to be filed by May 19,

[6] Petitioner Far East seeks to resolve here the measure of Kempner's damages (Far East Pet. 17–19). That issue is clearly premature as to Kempner, since it has not yet been passed upon by the Commission.

[7] While petitioner Far East seeks to use the present case as a vehicle for adjudicating the nature of the Section 15 approval requirement in other contexts (Far East Pet. 11), no such problems are involved here. Only the question of dual-rate systems prior to 1958 is now before the Court. Petitioner's hypothetical issues can be resolved when an appropriate case arises.

1960. We are advised by the Deputy General Counsel of the Commission that, as far as he is aware, not more than one such case filed before that date is presently pending.

CONCLUSION

The petitions for certiorari raise no issues of continuing importance and should be denied.

Respectfully submitted.

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JUNE 1963.

It may be, as petitioners argued below (see also Gulf Pet. 14; Far East Pet. 16), that the moratorium Act prospectively validated the use of unapproved dual-rate systems. If so, neither the approval question arise with respect to claims accruing *after* the moratorium date of May 19, 1958. But in any event no such claim is involved here, nor does the present case raise the question of the prospective effect of the moratorium law upon unapproved dual-rate systems.

APPENDIX

The permanent dual-rate law, Section 14b of the Shipping Act, 1916, as amended, October 3, 1961, 75 Stat. 762, 46 U.S.C. 813a, provides as follows:

> Notwithstanding any other provisions of this chapter, on application the Federal Maritime Commission (hereinafter "Commission"), shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract, amendment, or modification thereof, which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers unless the Commission finds that the contract, amendment, or modification thereof will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and provided the contract, amendment, or modification thereof, expressly (1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice; (2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in

no case less than ninety days; (3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: *Provided, however,* That it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract; (4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available; (5) limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law: *Provided, however,* That the contract may specify that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling; (6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice; (7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates; (8) excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots: *Provided, however,* That upon finding that economic factors so warrant, the Commission may exclude from the contract any commodity subject to the foregoing exception; and (9) contains such other provisions not inconsistent herewith as the Commission shall require or

permit. The Commission shall withdraw permission which it has granted under the authority contained in this section for the use of any contract if it finds, after notice and hearing, that the use of such contract is detrimental to the commerce of the United States or contrary to the public interest, or is unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. The carrier or conference of carriers may on ninety days' notice terminate without penalty the contract rate system herein authorized, in whole or with respect to any commodity: *Provided, however,* That after such terminations the carrier or conference of carriers may not reinstitute such contract rate system or part thereof so terminated without prior permission by the Commission in accordance with the provisions of this section. Any contract, amendment, or modification of any contract not permitted by the Commission shall be unlawful, and contracts, amendments, and modifications shall be lawful only when and as long as permitted by the Commission; before permission is granted or after permission is withdrawn it shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract, amendment, or modification. As used in this section, the term "contract shipper" means a person other than a carrier or conference of carriers who is a party to a contract the use of which may be permitted under this section.

Section 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U.S.C. 814, until its amendment on October 3, 1961, provided as follows:

> Every common carrier by water, or other person subject to this chapter, shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such

carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.

All agreements, modifications, or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly,

any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1–11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

Section 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 75 Stat. 763, as it appears in 46 U.S.C. 814, provides as follows:

> Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.
>
> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or

unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification or cancellation; except that tariff rates, fares, and charges,

and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1–11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

The interim dual-rate moratorium law, 72 Stat. 574, as amended, September 19, 1961, 75 Stat. 521, provided as follows:

That section 14 of the Shipping Act, 1916, is amended by inserting at the end thereof the following: "*Provided*, That nothing in this section or elsewhere in this Act, shall be construed or applied to forbid or make unlawful any dual rate contract arrangement in use by the members of a conference on May 19, 1958, which conference is organized under an agreement approved under section 15 of this Act by the regulatory body administering this Act, unless and until such regulatory body disapproves, cancels, or modifies such arrangement in accordance with the standards set forth in section

15 of this Act. The term 'dual rate contract arrangement' as used herein means a practice whereby a conference establishes tariffs of rates at two levels the lower of which will be charged to merchants who agree to ship their cargoes on vessels of members of the conference only and the higher of which shall be charged to merchants who do not so agree."

SEC. 2. This Act shall be effective immediately upon enactment and shall cease to be effective on and after October 15, 1961: *Provided, however,* That contracts in effect midnight September 14, 1961, shall remain in effect until midnight October 15, 1961, unless such contracts terminate earlier by their own terms, or are rendered illegal under the terms of the first section of this Act.

The saving statute, 1 U.S.C. 109, provides as follows:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 162

FAR EAST CONFERENCE, AMERICAN PRESIDENT LINES, LTD., ISTHMIAN LINES, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME COMMISSION, H. KEMPNER, GALVESTON COTTON COMPANY AND TEXAS COTTON INDUSTRIES, INC., RESPONDENTS

No. 163

GULF/MEDITERRANEAN PORTS CONFERENCE, ET AL., PETITIONERS

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, H. KEMPNER, GALVESTON COTTON COMPANY, TEXAS COTTON INDUSTRIES, AND THE MEMBERS OF THE FAR EAST CONFERENCE, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL MARITIME COMMISSION IN SUPPORT OF PETITIONS

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ROBERT E. MITCHELL,
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Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1138

FAR EAST CONFERENCE, AMERICAN PRESIDENT LINES, LTD., ISTHMIAN LINES, INC., ET AL.

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME COMMISSION, H. KEMPNER, GALVESTON COTTON COMPANY AND TEXAS COTTON INDUSTRIES, INC.

No. 1002

GULF MEDITERRANEAN PORTS CONFERENCE, ET AL.

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, H. KEMPNER, GALVESTON COTTON COMPANY, TEXAS COTTON INDUSTRIES, AND THE MEMBERS OF THE FAR EAST CONFERENCE

MEMORANDUM FOR THE FEDERAL MARITIME COMMISSION IN SUPPORT OF PETITIONS

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1. The Federal Maritime Commission supports the petitions for certiorari filed herein by the Gulf/Mediterranean and Far East Conferences on the ground that by the interim legislation (so-called Moratorium Act, Public Law 85-626, 72 Stat. 574,

and similar later enactments), Congress intended to insulate from the effects of the Isbrandtsen decision (356 U.S. 481) dual rate contracts in use on May 19, 1958. There is no doubt that Congress has the power in the circumstances present here to legislate retroactively, and it clearly exercised that power in its enactment of the interim legislation. Unless so construed, the primary purpose of the legislation, namely, to protect dual rate systems, would be frustrated. "Protection" without relief from liability for penalties and reparations is no protection at all. The Commission applied the plain language of the statute in the belief that Congress meant what it said, but the court below, by *per curiam* opinion with one judge dissenting (313 F. 2d 586), took the opposite position. No explanation was offered by the court and we cannot speculate as to what it relied upon for support. It is submitted that the dissent of Judge Danaher was eminently correct in concluding that "on this record the Board could have done nothing but what it did do."

2. The Commission regards as premature in these cases the question of reparations and their correct measure, which is raised by the Far East Conference (Pet. p. 4). If the court below is reversed for the reasons above-stated, the question of reparations will be academic. If the court below is not reversed, reparations will necessarily be the subject of further proceedings before the Commission, which is the proper forum to deal initially with contentions of the sort here urged by the Far East Conference (Pet. pp. 17-19).

3. The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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JAMES E. MAZURE,
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Federal Maritime Commission.

JUNE 7, 1963.